CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 200

HARRY M. BLACKMER, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED JULY 3, 1931

CERTIORARI GRANTED OCTOBER 19, 1931

(36,014)

(36,014)

SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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Court of Appeals of the District of Columbia

No. 5131.

HARRY M. BLACKMER, Appellant,

vs.

UNITED STATES.

a Supreme Court of the District of Columbia.

Contempt. No. 16.

UNITED STATES, Plaintiff,

vs.

HARRY M. BLACKMER, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 In the Supreme Court of the District of Columbia,
Holding a Criminal Term.

In Contempt. No. 16.

UNITED STATES

vs.

HARRY M. BLACKMER.

Petition for Issuance of Subpœna under the Act of July 3, 1926.

Filed May 13, 1927.

In the Supreme Court of the District of Columbia.

Criminal. No. 43,324.

THE UNITED STATES

vs.

HARRY F. SINCLAIR and ALBERT B. FALL.

The petition of Peyton Gordon, United States Attorney in and for the District of Columbia, and of Atlee Pomerene

and Owen J. Roberts, Special Assistants to the Attorney General of the United States, respectfully represents:

1. The above captioned cause is set for trial before one of the Justices of your honorable Court on Monday, the 17th day of October, 1927. Your petitioners desire the attendance at the trial of the above captioned cause of James E. O'Neil and H. M. Blackmer. The said James E. O'Neil and H. M. Blackmer are citizens of the United States and are now beyond the jurisdiction of the United States, your petitioners being advised that they are, or both lately have been, in the Republic of France.

2. That your petitioners believe and therefore aver that the attendance of the said persons at the trial of the said cause is vital and important to the United States, because as your petitioners aver, they believe that the said witnesses have knowledge and information with regard to certain important facts which the United States desires to prove in the said cause, and that their testimony as to said facts will be material in connection with the establishment not only of the conspiracy charged between the defendants in the above captioned cause, but in connection with the proof of overt acts done by the defendants pursuant to said conspiracy. More particularly your petitioners believe and therefore aver that the said James E. O'Neil and H. M. Blackmer can testify to facts concerning the persons who were in the latter part of the year 1921 and during the year 1922 stockholders of the Continental Trading Company, Ltd., a corporation, and with regard to the distribution by that corporation to its stockholders of certain United States 3½% Liberty Loan bonds as dividends, certain of which bonds, as your petitioners believe and therefore aver, were subsequently delivered by or on behalf of one of the defendants, Harry F. Sinclair, to the other defendant, Albert B. Fall.

3. That your petitioners base this petition upon the provisions of an Act of Congress, being No. 483 of the 68th Congress, entitled "An Act relating to contempts", approved July 3, 1926.

Wherefore your petitioners pray that your honorable Court, or one of the Justices thereof, may order that subpœnas issue in this cause addressed to any Consul General or Consul of the United States within the Republic

of France, or within any country in which either of the said witnesses may be, commanding such witness to
3 appear before this Court in Criminal Court No. 2, at the City of Washington, D. C., on the 17th day of October, 1927.

And your petitioners further pray that your honorable Court, or the Justice entering the order upon this petition, fix the amount which shall be tendered to the said witnesses respectively for their necessary expenses in traveling to and from the City of Washington, D. C., where this honorable Court sits, and the expenses of his attendance upon the Court; and your petitioners respectfully represent that $500.00 is a proper sum to be fixed in that behalf.

And your petitioners will ever pray, etc.

PEYTON GORDON,
United States Attorney.
ATLEE POMERENE,
R.,
OWEN J. ROBERTS,
Special Assistants to the Attorney General.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Owen J. Roberts, having been duly sworn according to law, did depose and say that the facts set forth in the foregoing petition are just, true and correct to the best of his knowledge, information and belief.

OWEN J. ROBERTS.

Sworn to and subscribed before me this 13th day
4 of May 1927.

[NOTARIAL SEAL.]

CARLTON G. SCHENKEN,
Notary Public, D. C.

Order Granting Subpœnas.

Filed May 13, 1927.

* * * * * * *

Upon consideration of the petition of Peyton Gordon, United States Attorney in and for the District of Columbia,

and Atlee Pomerene and Owen J. Roberts, Special Assistants to the Attorney General of the United States, this day filed praying for the issuance of subpœnas under the Act of July 3, 1926, it is by the Court this 13th day of May, 1927, ordered:

1. That subpœnas issue as prayed for in the said petition, which subpœnas shall at the request of the petitioners be addressed to any Consul of the United States in the Republic of France, or in any other country where said witnesses may be ascertained to be, commanding said witnesses to be and appear before this court in Criminal Court No. 2 thereof, on the 17th day of October, 1927.

2. That the amount to be tendered to each of the said witnesses for his necessary expenses in traveling to and from Washington, D. C., and for his attendance at Court, is fixed and determined at $500.00.

WILLIAM HITZ,
Justice.

5 *Petition of United States Attorneys for Rule in Contempt, &c.*

Filed November 4, 1927.

* * * * * * *

And now comes Peyton Gordon, United States Attorney for the District of Columbia and Atlee Pomerene and Owen J. Roberts, Special Counsel for the United States of America and represent to the Court:

(1) That on the 13th day of May, 1927, they presented their petition to this Honorable Court in accordance with the Act of Congress of July 3, 1926, c. 762 (44 Stat. 835), for the issuance of subpœnas directed to one H. M. Blackmer, who was and is a citizen of the United States and domiciled and residing therein but temporarily sojourning in France, to appear before this Honorable Court on Monday, the 17th day of October, 1927, as a witness in the case of United States vs. Harry F. Sinclair and Albert B. Fall, Criminal No. 43,324, on the docket of this Court, and said petition now appears of record therein.

(2) That on said 13th day of May, 1927, this Honorable Court made an order based upon the said petition for the

issuance of said subpœnas (this Court's journal 78, page 229) and on the said day subpœnas duly issued in accordance with the terms of said Act of Congress directed to Consuls of the United States in foreign countries for service upon the said H. M. Blackmer.

(3) That said subpœnas commanded the said H. M. Blackmer to appear before this Honorable Court at a criminal term thereof in the City of Washington, District of Columbia, on the 17th day of October, A. D. 1927, at 10 o'clock A. M., to testify on behalf of the United States in said case, Criminal No. 43,324, and not depart the
6 Court without leave of the Court or District Attorney.

(4) That in the order aforesaid it was provided that upon the service of any of said subpœnas the Consul serving the same should tender to the said H. M. Blackmer the sum of $500.00, for his necessary expenses in traveling to and from the place at which said Court sits and his expenses in attendance thereat.

(5) That on the 27th day of May, 1927, George Orr, a Consul of the United States at Paris, in France, served one of said subpœnas upon the said H. M. Blackmer at Paris, France, by exhibiting the same to him and by delivering to him personally a true copy thereof; and said Consul at the same time tendered to him the sum of $500.00, in currency of the United States, as ordered by this Court.

That on the 7th day of June, 1927, Raymond Davis, a Consul of the United States at Paris, in France, served one of said subpœnas upon the said H. M. Blackmer at Paris, France, by exhibiting and reading the same to him and by delivering to him personally a true copy thereof; and said Consul at the same time tendered to him the sum of $500.00, in currency of the United States, as ordered by this Court.

That the said H. M. Blackmer refused to take the said moneys, or any part thereof.

(6) That the said Consuls above mentioned made due return of service of said subpœnas and of the tender of said money as aforesaid to the Clerk of this Honorable Court, as appears of record in said cause. True copies of said subpœnas and the returns thereof are hereunto attached marked respectively Exhibit A and Exhibit B, which copies are hereby made a part hereof.

7 (7) That the trial of said case, Criminal No. 43,-324, commenced in this Court at 10 o'clack, A. M., Monday, October 17, 1927, and proceeded until about 12:15 o'clock P. M., on said day when, pursuant to the request of Hon. Nathan Miller and George Gordon Battle, representing themselves to be attorneys for said H. H. Blackmer, special counsel requested the Court to have the clerk call said H. M. Blackmer as a witness; that the Court so instructed the clerk and the clerk called "H. M. Blackmer"; that said H. M. Blackmer did not respond to said call and neglected and refused to appear; and thereupon said Nathan Miller and George Gordon Battle appeared for said H. M. Blackmer and at the request of said H. M. Blackmer for the purpose of stating that the witness was not present in court and would not appear in answer to said subpœnas. A true transcript of said proceedings is hereunto attached, marked Exhibit C, and made a part hereof.

Wherefore the said Peyton Gordon, United States Attorney as aforesaid, and said Atlee Pomerene and Owen J. Roberts, Special Counsel as aforesaid, pray this Honorable Court to issue an order in accordance with Section 4, c. 762 of said Act of July 3, 1926, directing the witness to appear before said Court upon a day and at a time to be designated in such order to show cause why he should not be adjudged guilty of contempt and punished accordingly.

And they further pray that this Honorable Court will direct as a part of said order and in accordance with Section 5, c. 762, of said Act, that the property of said H. M. Blackmer within the United States of the amount and value of $100,000.00, or such other amount and value as to the Court may seem proper, be levied upon and seized by
8 the Marshal of said Court and held to satisfy any judgment that may be rendered against the said H. M. Blackmer in this proceeding.

And they further pray that this Honorable Court will direct as a part of said order and in accordance with Section 6, c. 762, of Said Act, that the Marshal upon having made such levy and seizure shall forward to the Consuls of the United States in any countries where said H. M. Blackmer may be a copy of said order for personal service upon said Blackmer and shall cause said order to be published

in a newspaper of general circulation in the District of Columbia once each week for six consecutive weeks.

And your petitioners will ever pray, etc.

PEYTON GORDON,
United States Attorney for the District of Columbia.
OWEN J. ROBERTS,
ATLEE POMERENE,
Special Counsel for the United States.

9 "EXHIBIT A."

Supreme Court of the District of Columbia.

No. 43324, Criminal Docket.

THE UNITED STATES

vs.

HARRY F. SINCLAIR AND ALBERT B. FALL.

The President of the United States to H. M. Blackmer, Paris, France:

You are hereby commanded to attend the said court on Monday, the 17th of October, 1927, at 10 o'clock A. M., to testify on behalf of the United States, and not depart the Court without leave of the Court or District Attorney.

Witness The Honorable Walter I. McCoy, Chief Justice of said Court, the 13th day of May, A. D. 1927.

[SEAL.] FRANK E. CUNNINGHAM,
Clerk,
By H. B. DERTZBAUGH,
Assistant Clerk.

10 [Endorsed:] Criminal No. 43324. United States vs. Harry F. Sinclair and Albert B. Fall. Summons for the United States. Criminal Court No. 2. To George Orr, Consul of the United States at Paris, France: By order of the Court, you are directed to serve the within subpœna and true return thereon to make to this Court. Frank E. Cunningham, Clerk Supreme Court of the District of Columbia.

Consul's Return.

Summoned personally all, the 27th day of May, 1927, between 5 P. M. and 5.15 P. M. at the usual residence of the witness, rooms 501-502-503, Hotel Plaze Atheneé, 25 Avenue Montaigue, Paris, France, and in the presence of Consul Raymond Davis and Mr. Henri Gadd, Attorney for the witness. The witness declined to accept the sum of $500 in United States currency tendered him for traveling expenses. The original copy hereof was left in the hands of the witness.

Not to be found:

[Seal of the American Counsulate General, Paris, France.]

GEORGE ORR,
Consul of the United States of America at Paris, France.

11 Supreme Court of the District of Columbia.

Criminal.

No. 43324.

THE UNITED STATES, Plaintiff,

vs.

HARRY F. SINCLAIR and ALBERT B. FALL, Defendants.

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, do hereby certify the annexed to be a true and correct copy of the original summons as it appears of record in the Clerk's Office of said Court in the above-entitled cause.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, this 3rd day of November, 1927.

[SEAL.] FRANK E. CUNNINGHAM,
Clerk,
By WILLIAM W. STICKNEY,
Assistant Clerk.

12 "EXHIBIT B."

Supreme Court of the District of Columbia.

Criminal Docket.

No. 43324.

THE UNITED STATES

vs.

HARRY F. SINCLAIR and ALBERT B. FALL.

The President of the United States to H. M. Blackmer, Paris, France:

You are hereby commanded to attend the said court on Monday, the 17th of October, 1927, at 10 o'clock A. M., to testify on behalf of the United States, and not depart the Court without leave of the Court or District Attorney.

Witness The Honorable Walter I. McCoy, Chief Justice of said Court, the 13th day of May, A. D. 1927.

[SEAL.] FRANK E. CUNNINGHAM,
Clerk,

By H. B. DERTZBAUGH,
Assistant Clerk.

13 [Endorsed:] Criminal No. 43324. United States vs. Harry F. Sinclair and Albert B. Fall. Summons for the United States. Criminal Court No. 2. To Raymond Davis, Counsul of the United States at Paris, France: By order of the Court, you are directed to serve the within subpœna and true return thereon to make to this Court. Frank E. Cunningham, Clerk Supreme Court of the District of Columbia.

Counsul's Return.

Summoned personally all, the 7th day of June, 1927, H. M. Blackmer, by exhibiting said subpœna personally to the said H. M. Blackmer, reading the same to him, and leaving a duplicate copy with him at Paris, France.

And I further certify that pursuant to the order of the Court I did at the time of said service tender to the said

H. M. Blackmer the sum of $500 currency of the United States of America, which tender the said H. M. Blackmer then and there refused.

Not to be found:

[Seal of the American Counsulate General, Paris, France.]

RAYMOND DAVIS,
Counsul of the United States of America at Paris, France.

14 Supreme Court of the District of Columbia.

Criminal.

No. 43324.

UNITED STATES, Plaintiff,

vs.

HARRY F. SINCLAIR, ALBERT B. FALL, Defendant-.

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, do hereby certify the annexed to be a true and correct copy of the original summons as it appears of record in the Clerk's Office of said Court in the above-entitled cause.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, this 3rd day of November, 1927.

[SEAL.] FRANK E. CUNNINGHAM,
Clerk.
By WILLIAM W. STICKNEY,
Assistant Clerk.

15 EXHIBIT "C."

Mr. Roberts: May I ask Your Honor to have the clerk call H. M. Blackmer, a witness subpœnaed under leave of this court and under act of Congress, to appear here this morning?

The Court: Call the witness.

The Clerk: H. M. Blackmer? (calling the witness.)

Mr. Miller: May it please the Court, I have been requested by Mr. Blackmer to appear especially for the purpose of explaining to the Court why he is not here, because he does not desire even to appear to flout or be disrespectful of the process of this court.

The Court: Let me interrupt you a moment. As I understand it you appear especially to tell the Court first that the witness is not here. Then you are about to state the reasons that he gives for his non-appearance?

Mr. Miller: Yes, Your Honor.

The Court: I rather think that would come better at a later time.

Mr. Roberts: Yes, I object to that. I haven't the slightest objection to Governor Miller, who represents Mr. Blackmer, appearing here and saying to Your Honor that he (Blackmer) is not here in answer to the subpœna and, we understand, will not be. I would like to have that fact duly noted upon the record. It seems to me that until the Government moves in the matter no further matter should be heard by the Court.

The Court: When I spoke a few moments ago I was under the impression that that was all that was necessary at this time.

16 Mr. Miller: May I request that if the Government does move in respect of the non-appearance of Mr. Blackmer that I be given notice and opportunity to be heard?

Mr. Roberts: Certainly. The Government will gladly accord that. If the Court permits Mr. Miller the privilege of appearing we will gladly accord him the privilege of being notified when we desire to make a motion.

The Court: The Court understood that you were about to submit a motion, Mr. Roberts.

Mr. Roberts: No, I am not, Your Honor. I wish the record merely to show the fact that the witness that has been called has not responded.

17 *Order for Appearance, &c.*

Filed November 16, 1927.

* * * * * * *

And now, November 16th, 1927, upon consideration of the petition heretofore filed by Peyton Gordon, United

States Attorney for the District of Columbia, Atlee Pomerene and Owen J. Roberts, Special Counsel for the United States of America, it is ordered as follows:

1. The said Harry M. Blackmer is hereby directed to appear before this Court on Friday, January 6, 1928, at ten o'clock A. M., to show cause why he should not be adjudged guilty of contempt and be punished accordingly.

2. That the property of the said Harry M. Blackmer within the United States, of the amount and value of $100,000, be levied upon and seized by the Marshal of this Court and held to satisfy any judgment that may be rendered against the said Harry M. Blackmer in this proceeding.

3. That the Marshal of this Court is hereby directed upon making such levy to forward to the Consuls of the United States at Paris, France, at Nice, France, and at any other places in France or in any other countries where the said Harry M. Blackmer may be, a copy of this order, with the request that such Consul or Consuls make service of the same personally upon the said Harry M. Blackmer; and further that the said Marshal shall cause this order to be published in The Washington Evening Star, a newspaper of general circulation in the District of Columbia once each week for six consecutive weeks, in accordance with the provisions of Section 6, c. 762, of the Act approved July 3, 1926, 44 Stat. 835.

By the Court:

F. L. SIDDONS,
Judge.

18 *Marshal's Return.*

I have this 19th day of November, 1927, executed the within order in the case of United States vs. Harry M. Blackmer by levying upon and seizing One Hundred Thousand ($100,000) Dollars in United States First Liberty Loan Bonds at the par value of $100,000, the property of the said defendant, Harry M. Blackmer.

EDGAR C. SNYDER,
U. S. Marshal in and for the District of Columbia.

Return of Service.

Served a true copy of the within order on the within-named Harry M. Blackmer by delivering said true copy.

personally to him on the fifth day of December 1927, at the Hotel Plaza Atheneé, Paris, France.

GEORGE ORR,
Consul of the United States at Paris, France.

Dec. 5, 1927. 14100. No. Fre Prescribed.
Ret. Docketed Mch. 17, 1928.
F. E. CUNNINGHAM, *Clerk.*
C.B.C.

19 Filed November 19, 1927.

* * * * * * *

Schedule of Levy Under.

Ninety-five (95) First Liberty Loan Bonds, $1,000 ea.

Ten (10) First Liberty Loan Bonds, $500 ea.

as follows:

(1,000.00 denominations.)			(500.00 denominations.)
5806	614071	888700	
5807	614072	1005452	
5808	614073	1005453	211054
5809	614074	1005454	211055
22933	614075	1005455	182009
41257	631401	1005456	214940
41258	631402	1005457	265573
41259	720213	1005458	278356
41260	720214	1005459	278362
41261	720215	1019999	282378
41262	720216	1020000	282379
41263	720217	1020157	282618
41264	720218	1020158	
41265	720219	1020159	
41266	720220	1020160	
49282	750021	1020443	
50976	750022	1020444	
91659	750023	888702	
96417	750024	888703	
96418	750025	888704	
96420	750026	509626	
96421	750027		

(1,000.00 denominations.)	(500.00 denominations.)
96422	843080
107930	860308
196887	860309
267999	860310
268153	860312
268154	888351
460999	888352
509627	888353
509628	888354
509629	888355
509630	888356
509631	888357
509632	888358
509633	888359
509634	888699

Computation.

Par Value	100,000.00
Appreciated Value	1,812.50
Accrued Interest	1,497.00
	103,309.50

We, the undersigned, citizens of the District of Columbia, having been duly summoned and sworn by the Marshal of said District, do hereby certify that we have appraised the property described in the foregoing schedule at One Hundred Three Thousand Three Hundred Nine 50/100 Dollars.

Given under our hands and seals this 19th day of November, 1927.

ADAM A. WESCHLER. [SEAL.]
G. C. COLLIFLOWER. [SEAL.]

20 *Proof of Publication.*

Filed March 17, 1928.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, Elmer F. Yount, a Notary Public in and for the District of Columbia aforesaid, W. R. Little, who being duly sworn according to law, on oath says that he is the Agent and Auditor of The Evening Star, a daily newspaper published in the City of Washington, District of Columbia, and that the advertisement, of which the annexed is a true copy, was published in said newspaper six times on the following dates: November 19, 26, 1927; December 3, 10, 17, 24, 1927, at a cost of fifty-nine 40/100 (59.40) dollars.

W. R. LITTLE.

Sworn and subscribed to before me Mar. 16, 1928.

[NOTARIAL SEAL.] ELMER F. YOUNT,
Notary Public.

In the Supreme Court of the District of Columbia, Holding a Criminal Term.—United States vs. Harry M. Blackmer.—In contempt. No. 16.—Order.—And now, November 16, 1927, upon consideration of the petition heretofore filed by Peyton Gordon, United States attorney for the District of Columbia, Atlee Pomerene and Owen J. Roberts, special counsel for the United States of America, it is ordered as follows:

1. The said Harry M. Blackmer is hereby directed to appear before this court on Friday, January 6, 1928, at 10 o'clock a. m., to show cause why he should not be adjudged guilty of contempt and be punished accordingly.

2. That the property of the said Harry M. Blackmer within the United States, of the amount and value of $100,000, be levied upon and seized by the marshal of this court and held to satisfy any judgment that may be
21 rendered against the said Harry M. Blackmer in this proceeding.

3. That the marshal of this court is hereby directed, upon making such levy, to forward to the consuls of the United States at Paris, France; at Nice, France, and at any other places in France or in any other countries where the said Harry M. Blackmer may be, a copy of this order, with the request that such consul or consuls make service of the same personally upon the said Harry M. Blackmer; and further, that the said marshal shall cause this order to be published in The Washington Evening Star, a newspaper of general circulation in the District of Columbia, once each week for six consecutive weeks, in accordance with the provisions of Section 6, c. 762, of the act approved July 3, 1926, 44 Stat. 835. By the Court: F. I. Siddons, Judge. (Seal.) A true copy. Test: Frank E. Cunningham, Clerk, by Chas. B. Coffin, Asst. Clerk.

By virtue of a special order issued out of the Supreme Court of the District of Columbia in the case of the United States vs. Harry M. Blackmer, in contempt No. 16, I have this day levied upon and seized and taken into my custody

securities to the value of $100,000, being the property of the said Harry M. Blackmer, and I hereby give notice to the said Harry M. Blackmer to be and appear before the Supreme Court of the District of Columbia on or before January 6, 1928, at 10 o'clock a. m., otherwise the property levied upon and seized by me will be sold and the proceeds covered into the Treasury of the United States, as provided in said order of the court, "to satisfy any judgment against the said Harry M. Blackmer in this proceeding."

EDGAR C. SNYDER,
U. S. Marshal in and for
the District of Columbia.

22 *Motion to Vacate Order.*

Filed December 31, 1927.

* * * * * * *

And now come Nathan L. Miller and George Bordon Battle, attorneys for Harry M. Blackmer, appearing specially for the purposes of this motion only, and move this Honorable Court to vacate and set aside the order herein of this Honorable Court dated November 16, 1927, and all proceedings pursuant thereto, on the ground that this Honorable Court has not jurisdiction of said Blackmer and has not jurisdiction of this proceeding, for the following reasons, among others, viz:

(1) That said order and all proceedings pursuant thereto and the provisions of the Act of Congress of July 3, 1926, C. 762 (44 Stat. 835), pursuant to which said order was made and said proceedings had, are void because in conflict with the following provisions of the Constitution of the United States, viz:

(*a*) The Fifth Amendment, providing that no person shall be deprived of life, liberty, or property without due process of law;

(*b*) The Fourth Amendment, providing that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures, shall not be violated;

(*c*) The Eighth Amendment, providing that excessive fines shall not be imposed, nor unusual punishments inflicted;

(*d*) The Sixth Amendment, providing that in all criminal prosecutions, the accused shall enjoy the right to be
23 informed of the nature and cause of the accusation;

(*e*) The Sixth Amendment, providing that in all criminal prosecutions the accused shall enjoy the right of trial by jury;

(*f*) The Sixth Amendment, providing that in all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor.

Wherefore the undersigned move this Honorable Court to issue an order vacating and setting aside said order dated November 16, 1927, and vacating and setting aside the purported service thereof on said Blackmer by delivery of a copy thereof to him personally in France and by publication thereof in the Washington Evening Star pursuant to said order, and directing the immediate release of said Blackmer's property within the United States heretofore levied upon or seized by the Marshal pursuant to said order, viz., One Hundred Thousand Dollars par value of First Liberty Loan Bonds.

And the undersigned further move this Honorable Court to extend the time for answer in this proceeding until twenty days after final determination of the foregoing motion.

This motion is made upon the proceedings heretofore had herein and upon the annexed affidavit of George Gordon Battle, verified December 30, 1927.

Dated December 30, 1297.

NATHAN L. MILLER,
GEO. GORDON BATTLE,
Attorneys for Harry M. Blackmer, Appearing Specially for the Purposes of this Motion Only.

24 Please take notice that the above motion will be presented to this Court, Mr. Justice Siddons presiding on Jan. 6, 1928, at 10 a. m.

Respectfully,

NATHAN L. MILLER,
GEO. GORDON BATTLE,
Attorneys for H. M. Blackmer, Appearing Specially, &c.

Dated Dec. 31, 1927.

Affidavit in Support of Motion to Vacate Order.

* * * * * * *

STATE OF NEW YORK,
County of New York, ss:

George Gordon Battle, being duly sworn, deposes and says: I am one of the attorneys for Harry M. Blackmer in this proceeding, appearing specially for the purposes of the above mentioned motion only. I have acted as attorney for Mr. Blackmer in various matters during a number of years last past, and am familiar with his affairs.

Since prior to some time in the year 1926, Mr. Blackmer has never resided or been domiciled anywhere within the United States, but has continuously resided and been domiciled abroad.

I have requested Mr. Blackmer to make and forward to me his own affidavit of the facts in this regard, which I expect to receive shortly, and upon receipt thereof I will submit it to this Honorable Court in support of my
25 present affidavit.

GEO. GORDON BATTLE.

Sworn and subscribed to before me this 30th day of December, 1927.

[NOTARIAL SEAL.] EDITH M. HARDY,
Notary Public, Westchester Co.

Certificate filed in New York County.

Clerk's No. 27, Register's No. 9011.
Kings Co. Clk. No. 1, Reg. No. 9012.
Commission expires March 30, 1929.

26 *Affidavit of Henry M. Blackmer.*

Filed January 19, 1928.

CITY OF PARIS,
Republic of France, ss:

On this 2nd day of January, 1928 personally appeared before me Henry M. Blackmer, who, being duly sworn, deposes and says that he was born in the City of Worcester, State of Massachusetts, United States of America; that for

a period of over ten years up to and including 1923, he was a resident of the City of Denver, State of Colorado, United States of America, having his home in that city, and was actively engaged in business there; that for some years prior to 1923 he was the President and later the Chairman of the Board of Directors of the Midwest Refining Company, a Colorado corporation engaged in the oil business; that in the year 1924 he left the City of Denver, State of Colorado, United States of America, resigning his position as Chairman of the Board of Directors of the Midwest Refining Company, and retired from business, taking up his residence at Hotel Plaza Athenée, in the City of Paris, France (although retaining his American citizenship); that thereafter and in the year 1926 he formed the intention of residing permanently abroad and then disposed of his former home in the said City of Denver, since which time he has at all times resided abroad, spending his time in England, in France and elsewhere. Since 1924 the affiant has had no regular place of business in the United States of America, and such business affairs as he had in America have been handed chiefly by his attorneys in the City of New
27 York, State of New York.

HENRY M. BLACKMER.

Sworn to and subscribed before me this 2nd day of January, 1928.

[SEAL.] BENJAMIN H. CONNER,
A Commissioner for the State of New York.

28 *Order Continuing Hearing on Motion and Rule.*

Filed December 31. 1927.

* * * * * * *

Come now the parties hereto, by their respective attorneys of record (the attorneys for the respondent Harry M. Blackmer appearing specially for the purpose of the motion only) and now, this 31st day of December, A. D. 1927, before Mr. Justice Siddons, in open Court, attorneys for respondent move for a postponement of the hearing on the Rule to Show Cause heretofore made returnable January 6th, 1928 to a later date, and further having filed a motion to vacate the order of this Court dated November 16th,

1927, the said motion for postponement having been heard and considered, it is, for good cause shown,

Ordered, that the hearing on said motion and the hearing on the rule to show cause be and the same are hereby postponed to the 27th day of February, A. D. 1928, at ten o'clock A. M.

F. L. SIDDONS,
Justice.

29 In the Supreme Court of the District of Columbia.

Contempt. No. 16.

UNITED STATES

vs.

HARRY M. BLACKMER.

On Submission After Hearing Upon Motion to Vacate and Set Aside the Order of This Court Dated November 16, 1927, and All Proceedings Pursuant Thereto.

Filed Mar. 21, 1928. Frank L. Cunningham, Clerk.

Statement of the Case.

On December 31, 1927, Messrs. Nathan L. Miller and George Gordon Battle, attorneys for the respondent Harry M. Blackmer, "appearing specially for the purposes of this motion only," moved the Court to vacate and set aside its order of November 16, 1927, and all proceedings pursuant thereto, on the ground that the Court had not jurisdiction of Blackmer and had not jurisdiction of this proceeding for the reasons stated in the motion. The motion was brought forward for oral argument and then submitted on March 3, 1928, and the last of the trial briefs submitted on March 12, 1928. The reasons upon which the pending motion is based are

"That said order and all proceedings pursuant thereto and the provisions of the Act of Congress of July 3, 1926, C. 762 (44 Stat. 835), pursuant to which said order was made and said proceedings had, are void because in conflict with the following provisions of the Constitution of the United States,"

and the constitutional provisions cited are the Fourth, Fifth, Sixth and Eighth Amendments to the Constitution.

And then the motion proceeds to ask that the Court
30 issue an order vacating and setting aside its order of November 16, 1927, and vacating and setting aside th purported service thereof on said Blackmer by a delivery of a copy thereof to him personally in France and by publication thereof in the Washington Evening Star pursuant to said order, and directing the immediate release of said Blackmer's property within the United States heretofore levied upon or seized by the Marshal pursuant to said order. The motion further asked that the Court extend the date for answer in this proceeding until twenty days after final determination of the pending motion, and it concludes with the following paragraph:

"This motion is made upon the proceedings heretofore had herein and upon the annexed affidavit of George Gordon Battle, verified December 30, 1927."

The motion itself is dated December 30, 1927, but was filed on the next day.

The order to which the pending motion is directed is in the following terms:

"And now, November 16th, 1927, upon consideration of the petition heretofore filed by Peyton Gordon, United States Attorney for the District of Columbia, Atlee Pomerene and Owen J. Roberts, Special Counsel for the United States of America, it is ordered as follows:

1. The said Harry M. Blackmer is hereby directed to appear before this Court on Friday, January 6, 1928, at ten o'clock A. M., to show cause why he should not be adjudged guilty of contempt and be punished accordingly.

2. That the property of the said Harry M. Blackmer within the United States, of the amount and value of $100,000, be levied upon and seized by the Marshal of this Court and held to satisfy any judgment that may be rendered against the said Harry M. Blackmer in this proceeding.

3. That the Marshal of this Court is hereby di-
31 rected upon making such levy to forward to the Consuls of the United States at Paris, France, at Nice,

France, and at any other places in France or in any other countries where the said Harry M. Blackmer may be, a copy of this order, with the request that such Consul or Consuls make service of the same personally upon the said Harry M. Blackmer; and further that the said Marshal shall cause this order to be published in The Washington Evening Star, a newspaper of general circulation in the District of Columbia once each week for six consecutive weeks, in accordance with the provisions of Section 6, c. 762, of the Act approved July 3, 1926, 44 Stat. 835."

In the pending criminal case, No. 43,324, being the case of the United States vs. Harry F. Sinclair and Albert B. Fall, there was filed, on May 13, 1927, the petition of the United States Attorney in and for the District of Columbia, and of Atlee Pomerene and Owen J. Roberts, Special Assistants to the Attorney General of the United States, in which the petitioners alleged that the criminal case was set for trial on Monday, October 17, 1927, and that the petitioners desired the attendance at the said trial of one James E. O'Neil and H. M. Blackmer, who, the petition declared, are citizens of the United States, and then beyond the jurisdiction of the United States, the petitioners being advised that they were then, or lately had been, in the Republic of France; that the attendance of said two persons at the criminal trial mentioned

"is vital and important to the United States, because as your petitioners aver, they believe that the said witnesses have knowledge and information with regard to certain important facts which the United States desires to prove in the said cause, and that their testimony as to said facts will be material in connection with the establishment not only of the conspiracy charged between the defendants in the above captioned cause, but in connection with the proof of overt acts done by the defendants pursuant to
32 said conspiracy. More particularly your petitioners believe and therefore aver that the said James E. O'Neil and H. M. Blackmer can testify to facts concerning the persons who were in the latter part of the year 1921 and during the year 1922 stockholders of the Continental Trading Company, Ltd., a corporation, and with regard to the distribution by that corporation to its stockholders of

certain United States 3½% Liberty Loan bonds as dividends, certain of which bonds, as your petitioners believe and therefore aver, were subsequentlyy delivered by or on behalf of one of the defendants, Harry F. Sinclair, to the other defendant, Albert B. Fall."

The petition further alleged that is was based upon the provisions of the Act of Congress, being No. 483 of the 68th Congress, entitled "An Act relating to contempts," approved July 3, 1926, and the petitioners therefore prayed that the Court order that subpœnas issue in this cause, addressed to any Consul General or Consul of the United States within the Republic of France, or within any country in which either of the said witnesses might be, commanding such witness to appear before this Court in Criminal Court No. 2, at the City of Washington, D. C., on the 17th day of October, 1927. The petition further prayed that the Court, upon entering the order, fix the amount which shall be tendered to the said witnesses, respectively, for their necessary expenses in travelling to and from the City of Washington, D. C., where the Court sits, and the expenses of his attendance upon the Court, and they represented that Five Hundred (500) Dollars would be a proper sum to be fixed in that behalf.

Pursuant to that petition, the Court, on the same day, passed an order directing that subpœnas issue, as prayed for in the petition, which subpœnas should be ad-
33 dressed to any Consul of the United States in the Republic of France, or in any other country where said witnesses may be ascertained to be, commanding said witnesses to be and appear before the Court in Criminal Court No. 2, on the 17th of October, 1927, and fixing the amount to be tendered to each of said witnesses for his necessary expenses in traveling to and from Washington, D. C., and for his attendance at Court, at the sum of Five Hundred (500) Dollars.

Pursuant to that order, the subpœnas were issued and one of the subpœnas directed to the respondent Blackmer was, according to the return, personally server upon him on May 27, 1927,

"between 5 P. M. and 5:15 P. M. at the usual residence of the witness, rooms 501-502-503, Hotel Plaze Atheneé, 25

Avenue Montaigue, Paris, France, and in the presence of Consul Raymond Davis and Mr. Henri Gadd, Attorney for the witness. The witness declined to accept the sum of $500 in United States currency tendered him for traveling expenses. The original copy hereof was left in the hands of the witness."

This return is made by George Orr, Consul of the United States of America at Paris, France. The return is under date of May 27, 1927. There had been, however, two subpœnas issued for Blackmer, the first dated May 13, 1927, and which contains the return just quoted, and another, issued on the same day, the return to which was made under date of June 7, 1927, and the return is in the following words:

"Summoned personally all, the 7th day of June, 1927, H. M. Blackmer, by exhibiting said subpœna personally to the said H. M. Blackmer, reading the same to him, and leaving a duplicate copy with him at Paris, France.
34 And I further certify that pursuant to the order of the Court I did at the time of said service tender to the said H. M. Blackmer the sum of $500 currency of the United States of America, which tender the said H. M. Blackmer then and there refused."

This return was made by Raymond Davis, Consul of the United States at Paris, France.

It should also be stated that a copy of the order of the Court, which is attacked by the pending motion, was also personally served upon the respondent Blackmer in Paris, France, on December 5, 1927, and a return of the fact of service made to this Court. There has also been made a return, under date of November 19, 1927, by the Marshal in and for the District of Columbia, of his levy upon and seizing One Hundred Thousand (100,000) Dollars in United States First Liberty Bonds, at the par value of One Hundred Thousand (100,000) Dollars, the property of the respondent Blackmer, and proof of publication in the Washington Evening Star, as required by said order, has also been made.

There is no denial, by or on behalf of the respondent, and it is clear that the requirements of the Act of Congress

mentioned, in such a case as is herein presented, have been scrupulously observed and carried out.

Reasons and Conclusion.

The pending motion is in the nature of a demurrer, raising the question of the constitutionality of the Act of Congress, pursuant to which the foregoing proceedings took place, and, stating the matter broadly, it presents
35 the contention that Congress could not, constitutionally clothe this Court with the powers exercised by it, as above stated. The facts which the proceedings mentioned disclose, show that the respondent is a citizen of the United States, and was abroad, in France, when the subpœnas or summonses and order mentioned above, were personally served upon him.

In the examination of the statute under consideration, it is well to bear in mind some fundamental principles which control the relations which exist between a citizen of the United States and the Federal Government. These relations have to do with the duties of such a citizen to his government, and of his rights, privileges and immunities. No question is involved in this case, under the pending motion, of that dual citizenship that may exist under our form of government, that of State citizenship and United States citizenship. We are concerned only with a citizen of the United States, who, for several years, has been living abroad, and who has taken no step nor so conducted himself as to evidence an intention to effect expatriation.

While no case has been found that has attempted an enumeration of all of the duties of a citizen of the United States to his Government, both text writers and the Supreme Court have laid down the principle that such a citizen owes the prime duty of allegiance to his government. Thus we find the Supreme Court of the United States in Carlisle vs. United States, 16 Wal. 147, *154*, speaking through Mr. Justice Field, using this language:

36 "By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and tem-

porary one. The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign."

And at a later date, in the case of Minor vs. Happersett, 21 Wal., 162, *165, 166*, the Court, speaking through its then Chief Justice, uses this language:

"There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance."

And at a much later period, in 1913, the same Court, in the case of Luria vs. United States, 231 U. S., 9, *22*, speaking through Mr. Justice Van Devanter, uses this language:

"Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other."

And see the "Constitution of the United States," by the late Justice Miller of the Supreme Court of the United States, pages 294, 295. Vattel, "The Law of Nations," 1853 edition, pages 105, 172, 173, 174, and other text writers of authority.

37 To the foregoing may be added the language of the Supreme Court in two early cases; in the first of which the Court, speaking through Chief Justice Marshal, uses this language:

"It is conceded, that the legislation of every country is territorial; that *beyond its own territory, it can only affect its own subjects or citizens.*" (Underscoring supplied.) Rose vs. Himely, 4 Cranch *241, **279.*

and in the second, speaking through Mr. Justice Story:

"The laws of no nation can justly extend beyond its own territories, *except so far as regards its own citizens.* They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction." (Underscoring supplied.) The Apollon, 9 Wheat. *362, *370.

From the foregoing authorities, it appears clear that the allegiance of a citizen of the United States, though actually living in an foreign jurisdiction, includes the duty of obedience to the laws of the sovereignty to which the allegiance is due. Indeed, without such obedience allegiance would be but an empty name. It may be that there are cases and occasions when, by reason of the absence of the citizen in a foreign sovereignty, his government may not be able to inflict upon him, the punishment, for instance, of imprisonment for a violation of one of its laws, but this is not due to any imperfection in the scope of the allegiance, but rather to the limitations or restrictions imposed by international law and relations. Under these the government of the United States could not, without the consent of the foreign sovereignty where the offending citizen might be,
take him into custody, return him to his own country,
38 there to proceed against him for his offense. Though
this may not be done, it does not follow that there are not other means within the power of the government whose right to allegiance is flaunted by one or its citizens and obedience to its laws defied by him, by which the government may exact the allegiance due to it and, measurably at least, enforce obedience to its just laws, by imposing a penalty that does not require the physical presence of the offending citizen within the territorial jurisdiction of his government, for its execution.

This brings us to a brief examination of the Act of Congress, the constitutionality of which is challenged by the pending motion. It was approved July 3, 1926, and is entitled, "An Act Relating to Contempts." The first section of the Act prescribes the procedure that may be resorted to by a Court of the United States where a witness

"being a citizen of the United States or domiciled therein, and such witness, having been personally notified by it according to the practice of such court, to appear and tes-

tify pursuant to such letters rogatory and such witness shall neglect to appear, or having appeared shall decline, refuse, or neglect to answer to any question which may be propounded to him by or under the authority of such court, to which he would be required to make answer were he being examined before the court issuing such letters, the court out of which said letters issued may upon proper showing order that a subpœna issue addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the said court at a time and place therein designated."

The remaining sections of the statute are quoted in full:

39 "Sec. 2. Whenever the attendance at the trial of any criminal action of a witness, being a citizen of the United States or domiciled therein, who is beyond the jurisdiction of the United States, is desired by the Attorney General or any assistant or district attorney acting under him, the judge of the court before which such action is pending, or who is to sit in the trial of the same, may, upon proper showing, order that a subpœna issue, addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the said court at a time and place therein designated.

Sec. 3. It shall be the duty of any consul of the United States within any country in which such witness may be at the request of the clerk of the court issuing any subpœna under this Act or at the request of the officer causing such subpœna to be issued, to serve the same personally upon such witness and also to serve any orders to show cause, rules, judgments, or decrees when requested by the court or United States marshal, and to make a return thereof to the court out of which the same issued, first tendering to the witness the amount of his necessary expenses in traveling to and from the place at which the court sits and his attendance thereon, which amount shall be determined by the judge on issuing the order for the subpœna and supplied to the consul making the service.

Sec. 4. If a witness so served shall neglect or refuse to appear as in such subpœna directed, the court out of which

it was issued shall, upon proof being made of the service and default, issue an order directing the witness to appear before the court at a time in such order designated to show cause why he should not be adjudged guilty of contempt and be punished accordingly.

Sec. 5. Upon issuing such order the court may, upon the giving of security for any damages which the recusing witness may have suffered, should the charge be dismissed (except that no security shall be required of the United States), direct as a part of such order that the property of the recusing witness, at any place within the United States, or so much thereof in value as the court may direct shall be levied upon and seized by the marshal of said court in the manner provided by law or the rule of the court for a levy or seizure under execution, to be held to satisfy any judgment that may be rendered against such witness in the proceeding so instituted.

"Sec. 6. The marshal, having made such levy, shall thereupon forward to the consul of any country where the recusing witness may be a copy of the order to show cause why such witness should not be adjudged guilty of contempt with the request that said consul make service of the same personally upon the recusing witness, and shall cause to be published such order to show cause and for the sequestration of the property of such witness, in some newspaper of general circulation in the district within which the court issuing such order sits, once each week for six consecutive weeks.

Sec. 7. On the return day of such order or any later day to which the hearing may by the court be continued, proof shall be taken; and if the charge of recusancy against the witness shall be sustained, the court shall adjudge him guilty of contempt and, notwithstanding any limitation upon the power of the court generally to punish for contempt, impose upon him a fine not exceeding $100,000 and direct that the amount thereof, with the costs of the proceedings, be satisfied, unless paid, by a sale of the property of the witness so seized or levied upon, such sale to be conducted upon the notice required and in the manner provided for sales upon execution.

Sec. 8. Any judgment rendered pursuant to this Act upon service by publication only may be opened for answer

within the time and in the manner provided in section 57 of the Judicial Code."

It seems clear to the Court from an examination of this statute that its purpose and intent is to clothe the courts of the United States with the power to compel the appearance to testify of a necessary and a material witness in either civil suits or criminal actions, (in the latter actions if the attendance of the witness "is desired by the Attorney General or any assistant or district attorney acting under him",) if he be a citizen of the United States or domiciled therein, but who is, beyond the territorial jurisdiction of the United States, and that if such a witness refuses to obey the subpœna or subpœnas of the Court issued pursuant to the Act, that it further provides for the institution of con-/ tempt proceedings against him. In that event the statute prescribes that the Court issue an order directing the witness to appear before the Court, at a time in such
41 order designated, to show cause why he should not be adjudged guilty of contempt and be punished accordingly (Section 4); that upon issuing such an order the Court may direct, as part of such order, that the property of the recusing witness at any place within the United States, or so much thereof in value as the Court may direct, shall be levied upon and seized by the Marshal of said court "to be held to satisfy any judgment that may be rendered against such witness in the proceeding so instituted." (Section 5). The Marshal having made the levy, shall thereupon forward to the Consul of any country where the recusing witness may be a copy of the order to show cause, with the request that said Consul make service of same personally upon the recusing witness, and shall cause to be published such order to show cause "and for the sequestration of the property of such witness, in some newspaper of general circulation in the district within which the court issuing such order sits, once each week for six consecutive weeks." (Section 6). On the return day of such order, or at a later day to which the hearing may be continued, proof shall be taken, and if the charge of recusancy against the witness shall be sustained, the court shall adjudge him guilty of contempt and "nothwithstanding any limitation upon the power of the court generally to

punish for contempt, impose upon him a fine not exceeding $100,000 and direct that the amount thereof, with the costs of the proceeding, be satisfied, unless paid, by a
42 sale of the property of the witness so seized or levied upon, such sale to be conducted upon the notice required and in the manner provided for sales upon execution.'" (Section 7.)

It thus appears that knowledge of every essential step prescribed by the statute in such a case is to be brought home to the witness by personal service upon him in the foreign sovereignty in which he may be, of the subpoenas and orders of the Court, and the witness has but to yield obedience to the requirements of the law in order to escape the consequences that may follow from his disobedience, and if he renders obedience, he renders it at no expense to himself, and is, as it seems to the Court, but performing an imperative duty of United States citizenship, which may be of vital importance to his Government.

It is urged on the respondent's behalf that pursuant to constitutional provisions, he cannot thus be coerced unless within the territorial jurisdiction of his country and its courts. This Court cannot accept this contention, which, if sound, would in such case render the Government supine and helpless. The provision of the statute for the sequestration of the property of such a witness within the territorial jurisdiction of the United States is analogous to the sequestration of property, not infrequently made, of a party litigant who otherwise, by the simple expedient of remaining out of the territorial jurisdiction of the court, may defeat the purposes of a suit or action. It may be re-
43 marked that the statute also contemplates a *locus penitentiae* for the disobedient citizen and witness.

In the respondent's behalf, the contentions as to the alleged unconstitutionality of this Act have been presented with zeal and ability, but, in the Court's opinon, have been fully met by the exhaustive and, the Court thinks, conclusive answer that government counsel have made to them. The trial briefs, which the respective counsel have submitted, disclose how carefully the arguments, pro and con, which have been made, are based upon a very thorough examination of the applicable law upon the subject.

Much more could be said by the Court in support of the conclusion that it has reached, and this much more should be said.

In approaching a question of the alleged unconstitutionality of an Act of the legislature, we should bear in mind the language of Chief Justice Marshall in the case of Fletcher vs. Peck, 6 Cranch *87, *128:

"The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

44 And, again, we have the language of a prevailing opinion in the famous case of Ogden vs. Saunders, 12 Wheat. *213, *270, where the Court, speaking through Mr. Justice Washington states:

"I shall now conclude this opinion, by repeating the acknowledgment which candor compelled me to make in its commencement, that the question which I have been examining is involved in difficulty and doubt. But if I could rest my opinion in favor of the constitutionality of the law on which the question arises, on no other ground than this doubt so felt and acknowledged, that alone, would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt. This has always been the language of this court, when that subject has called for its decision; and I know that it expresses the honest sentiments of each and every member of this bench."

And, again, the Supreme Court, speaking through Mr. Chief Justice Waite, in the Sinking-Fund Cases, 99 U. S. 700, 718, uses this language:

"It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

(And see, Briscoe vs. Bank of Kentucky, 8 Pet. 118, 122; Railway Company vs. Wellman, 143 U. S. 339, 345, 346; Brown vs. Walker, 161 U. S. 591, 596; Naganab vs.
45 Hitchcock, 25 D. C. App., 200, 205; Cooley's Principles of Constitutional Law, 163, et seq.; 1 Roses Notes 396, 397, et seq.; and 2 Roses Notes 412, 418, et seq.)

This being the attitude of the Supreme Court of the United States, with what compelling force does it bear upon a trial court. If the writer of the present memorandum had a doubt of the constitutionality of the Act in question, he would, under the wise rule of the Supreme Court quoted above, resolve that doubt in favor of the constitutionality of this Act of the Federal Congress.

For the reasons stated above, the conclusion is that the pending motion must be overruled. And an order to this effect will be settled and signed on notice.

F. L. SIDDONS,
Justice.

March 21, 1928.

46 *Decree.*

Filed April 23, 1928.

* * * * * * * *

And now, to-wit, April 23rd, 1928, the motion to vacate and set aside the order of this Court dated November 16,

1927, and all proceedings pursuant thereto having come on to be heard and having been fully argued by counsel, it is ordered and decreed that the said motion to vacate and set aside the order of this Court dated November 16, 1927, and all proceedings pursuant thereto be and the same is hereby overruled; and the defendant, Harry M. Blackmer, is hereby given 20 days in which to file his answer in the above-entitled proceedings.

F. L. SIDDONS,
Justice.

47 *Plea.*

Filed May 14, 1928.

* * * * * * *

Whereas on or about December 30, 1927, Nathan L. Miller and George Gordon Battle, attorneys for the defendant, Harry M. Blackmer, appearing specially for that purpose only, moved this Honorable Court to vacate and set aside the order to show cause herein, dated November 16, 1927, and all proceedings pursuant thereto, on the ground that this Honorable Court had not jurisdiction of the defendant or of this proceeding, and in particular moved this Honorable Court to vacate and set aside the purported service herein of said order on the defendant while in Paris, France, pursuant to the terms of said order, and to direct the release of his property in the United States seized pursuant to the terms thereof; and

Whereas said motion was made upon the proceedings theretofore had herein and upon the affidavit of said George Gordon Battle, thereto annexed, showing that since prior to 1907 the defendant had never resided or been domiciled anywhere within the United States but had continuously resided and been domiciled abroad; and

Whereas on the hearing of said motion the defendant's said attorneys requested a preliminary trial of the facts so alleged, if controverted by the United States, and thereupon the attorneys for the United States stated in open court that said allegations regarding the defendant's residence and domicile were not controverted by the United States; and

48 Whereas said allegations were not controverted and accordingly no trial of the facts so alleged was had; and

Whereas by order dated April 23, 1928, this Honorable Court denied said motion and gave the defendant twenty days from said date in which to file his answer herein; and

Whereas the defendant and his said attorneys believe that this Honorable Court has not jurisdiction of the defendant or of this proceeding and that said motion should accordingly have been granted:

Now, therefore, the defendant, Harry M. Blackmer, by his said attorneys, Nathan L. Miller and George Gordon Battle, appears and answers herein under protest, pursuant to said order of April 23, 1928, reserving all his claims and rights in and under said motion of December 30, 1927, and the proceedings had thereon; and, subject to such protest and reservation, for his plea to the charge contained in the petition heretofore filed herein on behalf of the United States pursuant to which said order to show cause of November 16, 1927, was issued, answers the allegations of said petition as follows:

1. Answering the allegations contained in paragraph (1) of said petition, the defendant denies that he was on May 13, 1927, or has been at any time since said date, domiciled or resident in the United States or only temporarily sojourning in France; denies that the petition of May 13, 1927, referred to in said paragraph, so stated; and alleges that continuously since prior to the year 1927 and up to the present time the defendant has been domiciled and has resided without the United States. Except as hereinbefore denied or alleged to the contrary, the defendant ad-

49 mits the allegations contained in said paragraph (1).

2. Answering the allegations contained in paragraph (2) of said petition, the defendant denies that the issuance of subpœnas therein referred to was due or lawful; denies that the order of May 13, 1927, therein referred to, for such issuance of subpœnas, was due or lawful; denies that the petition of May 13, 1927, therein referred to, upon which said order was based, was a sufficient basis therefor in law. Copies of said petition and order, marked Exhibit "A" and Exhibit "B" respectively, are hereto annexed and made parts hereof. Except as hereinbefore denied or alleged to the contrary, the defendant admits the allegations contained in said paragraph (2).

3. The defendant admits the allegations contained in paragraphs (3) and (4) of said petition.

4. Answering the allegations contained in paragraph (5) of said petition, the defendant denies that the steps therein alleged to constitute service of one of said subpœnas upon him in Paris, France, on May 27, 1927, constituted due or lawful service thereof upon him or had any legal force or effect; denies that the steps therein alleged to constitute service of one of said subpœnas upon him in Paris, France, on June 7, 1927, constituted due or lawful service thereof upon him or had any legal force or effect; alleges that at the time of each such alleged service he declared his refusal to accept such service; and denies that either of said subpœnas was ever of any legal force or effect in Paris, France. Except as hereinbefore denied or alleged to the contrary, the defendant admits the allegations contained in said paragraph (5).

5. Answering the allegations contained in paragraph (6) of said petition, the defendant denies that the returns of service therein referred to were due or lawful; and alleges that each of said returns shows on its face that the alleged service, therein referred to, was not due or lawful service nor of any legal force or effect. Except as hereinbefore denied or alleged to the contrary, the defendant admits the allegations contained in said paragraph (6).

6. Answering the allegations contained in paragraph (7) of said petition, the defendant denies that there was any neglect or refusal on his part in failing to appear as therein alleged; denies that Nathan L. Miller and George Gordon Battle or either of them or anyone appeared for the purpose of stating or stated that the defendant would not appear in answer to said subpœnas; alleges that said attorneys then and there appeared specially for the sole purpose of explaining to this Honorable Court why the defendant was not there at said time, and then and there offered to make such explanation but were not permitted by this Honorable Court to do so. Except as hereinbefore denied or alleged to the contrary, the defendant admits the allegations contained in said paragraph (7).

And for a further plea,

7. The defendant realleges the allegations contained hereinbefore, as if here repeated at length; and alleges

that the order of May 13, 1927, referred to in paragraph (1) of said petition, and the issuance and alleged service of subpœnas pursuant thereto, referred to in paragraphs (2), (3) and (5) of said petition, and the alleged returns of such alleged service, referred to in paragraph (6) of said
51 petition, and the provisions of the Act of Congress of July 3, 1926, C. 762 (44 Stat. 835), pursuant to which said proceedings were taken, were and are null, void and of no force or effect because in conflict with the Constitution of the United States, especially the provision of the Fifth Amendment, that no person shall be deprived of life, liberty or property without due process of law, and the provision of the Sixth Amendment, that in all criminal prosecutions the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor.

And for a further plea,

8. The defendant alleges that, after the alleged service of subpœnas referred to in paragraph (5) of said petition, the defendant, desiring to perform his legal obligations in the premises, if any, obtained opinions in that regard from several attorneys at law of high repute in the United States, including the attorneys now representing him in this proceeding; that he was advised by each and all of said attorneys, after full consideration, that he was not under any such obligation, but that, on the contrary, said alleged service and the proceedings purporting to authorize the same and the provisions of the Act of Congress purporting to legalize said proceedings were unconstitutional and wholly void and of no force or effect for the reasons hereinbefore mentioned; and that it was because of said advices that the defendant did not appear according to the purported command of said alleged subpœnas so allegedly served.

Wherefore the defendant prays judgment that he is not guilty of contempt of court as charged in said peti-
52 tion and directing the release of his property within the United States heretofore seized by the Marshal pursuant to said order to show cause, dated November 16, 1927, viz., One Hundred Thousand Dollars par vlaue of First Liberty Loan Bonds.

NATHAN L. MILLER,
GEO. GORDON BATTLE,
Attorneys for Defendant.

53 *Joinder of Issue on Defendant's First Plea.*

Filed July 6, 1928.

* * * * * * *

And now comes the United States, by its attorneys, Leo A. Rover, United States Attorney for the District of Columbia, and Atlee Pomerene and Owen J. Roberts, Special Counsel for the United States of America, and joins issue with the defendant upon the allegation contained in paragraph one (1) of the defendant's first plea to the effect that "continuously since prior to the year 1927 and up to the present time the defendant has been domiciled and has resided without the United States"; and also upon the further allegation contained in paragraph five (5) of the defendant's first plea to the effect that "each of said returns shows on its face that the alleged service therein referred to was not due or lawful service"; and also upon the further allegation contained in paragraph six (6) of the defendant's first pleas to the effect that "said attorneys then and there appeared specially for the sole purpose of explaining to this Honorable Court why the defendant was not there at said time, and then and there offered to make such explanation but were not permitted by this Honorable Court to do so."

LEO A. ROVER,
United States Attorney.
OWEN J. ROBERTS,
ATLEE POMERENE,
Special Attorney for the United States.

54 *Demurrer to Defendant's Further Pleas.*

Filed July 6, 1928.

* * * * * * *

And now comes the United States, by its attorneys, Leo. A. Rover, United States Attorney for the District of Columbia, and Atlee Pomerene and Owen J. Roberts, Special Counsel for the United States of America, and demurs to

the defendant's further pleas, and says that the said two (2) further pleas are bad in substance.

LEO A. ROVER,
United States Attorney.
OWEN J. ROBERTS,
ATLEE POMERENE,
Special Counsel for the United States.

NOTE.—Among the matters of law intended to be argued in support of the foregoing demurrer are the following:

1. The Act of July 3, 1926, C. 762 (44 Stat. 835), does not violate in any manner the provisions of the Fifth and Sixth Amendments to the Constitution of the United States or any other provisions thereof.

2. The matter alleged in the defendant's second further plea (paragraph 8), even though true, does not constitute any defense to the present action.

3. The Act of July 3, 1926, C. 762 (44 Stat. 835), is constitutional and binding upon the defendant.

4. The further pleas of the defendant (paragraphs 7 and 8), are bad for other reasons on their face.

55 *Amended Plea.*

* * * * * * *

Recd. Sep. 9/29. F. E. Cunningham, Ck.

Whereas heretofore Nathan L. Miller and George Gordon Battle, attorneys for the defendant, Harry M. Blackmer, appearing specially for that purpose only, moved this Honorable Court to vacate and set aside the Order to Show Cause herein dated November 16, 1927, and all proceedings pursuant thereto, on the ground that this Honorable Court had not and has not jurisdiction of defendant or jurisdiction of this proceeding, for the reason and upon the grounds mentioned in said motion, and in particular moved this Honorable Court to vacate and set aside the purported service herein of said Order to Show Cause on defendant while in Paris, France, pursuant to the terms of said order, and to direct the release of his property within the United States heretofore levied upon or seized or attempted to be levied upon or seized by the Marshal pursuant to said order; and

Whereas said motion was made upon the proceedings theretofore had herein and upon the affidavit of said George Gordon Battle thereto annexed, verified December 30, 1927, wherein it appeared that since prior to 1927, defendant had never resided or been domiciled anywhere within the United States but had continuously resided and been domiciled abroad; and

Whereas on the hearing of said motion on March 3, 1928 there was also before this Honorable Court an affidavit of defendant relating to his residence abroad, and de-
56 fendant's said attorneys requested a preliminary trial of the facts as to defendant's residence and domicile as alleged in said affidavits, if controverted by the United States, pursuant to which said Order to Show Cause States stated in open court that said allegations were not controverted by the United States; and

Whereas said allegations were not controverted and accordingly no trial of the facts so alleged was had; and

Whereas by order dated April 23, 1928, this Honorable Court overruled and denied the said motion and gave defendant twenty days in which to file his answer herein; and defendant and his attorneys believe that this Honorable Court has not jurisdiction of defendant or of this proceeding, and that said motion should accordingly have been granted:

Now, therefore, defendant, by his undersigned attorney, appears and answers herein under protest, pursuant to said order of April 23, 1928, reserving all his claims and rights in and under the said motion and the proceedings had thereon; and subject to such protest and reservation, for his plea to the charge contained in the Petition for Order to Show Cause heretofore filed on behalf of the United States, pursuant to which said Order to Show Cause of November 16, 1927, was issued, answers the allegations of said petition as follows:

1. Answering paragraph 1 of said Petition for Order to Show Cause, defendant:

(*a*) Admits that on the 13th day of May, 1927, Peyton Gordon, United States Attorney for the District of Columbia, and Atlee Pomerene and Owen J. Roberts, Special Counsel for the United States of America, presented
57 their petition to this Honorable Court for the issuance of subpœnas (hereinafter referred to as said Pe-

tition for Subpœnas) directed to defendant, who was and is a citizen of the United States, to appear before this Honorable Court on Monday, the 17th day of October, 1927, as a witness in the case of the United States vs. Harry F. Sinclair and Albert B. Fall, Criminal No. 43,324, on the docket of this Honorable Court, and that said Petition for Subpœnas now appears of record therein.

(*b*) Denies that on May 13, 1927, or at any time since, defendant was domiciled or resident in the United States or but temporarily sojourning in France.

Denies that said Petition for Subpœnas so stated.

(*c*) Denies that said Petition for Subpœna was presented to this Honorable Court in accordance with the Act of Congress of July 3, 1926, C. 762 (44 Stat. 835) (hereinafter referred to as "said Act of Congress") and denies that said Petition for Subpœnas was in accordance with said Act of Congress.

(*d*) Alleges that continuously since prior to the year 1927 and up to the present time defendant has been domiciled and has resided without the United States.

(*e*) Alleges that said Petition for Subpœnas shows on its face that it was and is wholly invalid as a showing for the issuance of subpœnas directed to defendant in accordance with said Act of Congress, for the reason that all allegations therein contained pretending to constitute such showing are not based upon facts but upon mere unsupported, unverified beliefs of the petitioners.

58 (*f*) Alleges that said Petition for Subpœnas expressly admits that defendant is beyond the jurisdiction of the United States.

(*g*) Alleges that the presentation of and the action of this Honorable Court on said Petition for Subpœnas were entirely ex parte; that defendant was afforded neither due notice thereof nor due opportunity to be heard therein;

Alleges that defendant never received said Petition for Subpœnas, or a true copy or due notice thereof, pursuant to said Act of Congress, or to any order of this Honorable Court, or to any lawfully authorized action of any person whomsoever, in or in connection with the proceedings, or any of them, alleged or prayed for in said Petition for Order to Show Cause.

2. Answering paragraph 2 of said Petition for Order to Show Cause, defendant:

(*a*) Admits that on the 13th day of May, 1927, this Honorable Court made an order based upon the said Petition for Subpœnas for the issuance of the subpœnas therein prayed for, and that on the same day alleged subpœnas were issued directed to Consuls of the United States in foreign countries for service upon defendant.

(*b*) Denies that said alleged subpœnas duly issued;

Denies that said alleged subpœnas duly issued in accordance with the terms of said Act of Congress.

(*c*) Alleges that the alleged subpœnas referred to in paragraph 2 of said Petition for Order to Show Cause and therein alleged to have been issued on the 13th day of May, 1927, were in form as follows, to wit:

59 Supreme Court of the District of Columbia.

No. 43,324, Criminal Docket.

THE UNITED STATES

vs.

HARRY F. SINCLAIR and ALBERT B. FALL.

The President of the United States to —— ——:

You are hereby commanded to attend the said court on Monday, the 17th day of October, 1927, at ten o'clock A. M., to testify on behalf of the United States, and not depart the Court without leave of the Court or District Attoreny.

Witness the Honorable Walter I. McCoy Chief Justice of said Court, the 13th day of May, A. D. 1927.

[Seal of the Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk,

By —— ——,
Assistant Clerk.

3. Answering paragraph 3 of said Petition for Order to Show Cause, defendant

(*a*) Admits the allegations therein contained.

4. Answering paragraph 4 of said Petition for Order to Show Cause, defendant

60 (*a*) Admits that the amount to be tendered to each of the witnesses referred to in said order of this Honorable Court (based upon said Pettiion for Subpœnas) for his necessary expenses in traveling to and from Washington, D. C., and for his attendance at Court, was by said order fixed and determined at $500.00.

(*b*) Dénies each and every other allegation therein contained.

5. Answering paragraph 5 of said Petition for Order to Show Cause, defendant

(*a*) Admits that on the 27th day of May, 1927, George Orr, at Paris, in France, exhibited to and left in the hands of defendant at Paris, France, an alleged true copy of an alleged subpœna in form and substance as set out in Exhibit A attached to said Petition for Order to Show Cause; admits that said George Orr at the same time tendered to defendant the sum of Five Hundred Dollars ($500.00) in currency of the United States, and that defendant refused to take the said moneys or any part thereof.

(*b*) Admits that on the 7th day of June, 1927, Raymond Davis, at Paris, in France, exhibited and read to defendant an alleged subpœna in form and substance as set out in Exhibit B attached to said Petition for Order to Show Cause, and left with defendant, at Paris, France, a duplicate copy thereof; admits that said Raymond Davis at the same time tendered to defendant the sum of $500.00, in currency of the United States, and that defendant refused to take said moneys or any part thereof.

(*c*) As to the allegations that said George Orr and Raymond Davis were Consuls of the United States at
61 Paris, France, defendant has no knowledge or information thereof sufficient to form a belief, and therefore denies the same.

(*d*) Denies that the matters and things done alleged in paragraph 5 of said Petition for Order to Show Cause, or any of them, constitute due or lawful service of the alleged subpœnas referred to in said paragraph 5, or of either of them, upon defendant in Paris, France, on the dates mentioned, or at any other time, or that said alleged matters

and things done, or any of them, had any legal force or effect;

Denies that the said tenders of moneys, or either of them, by said Orr and/or Davis were "as ordered by this Honorable Court".

Denies that said alleged subpœnas, or either of them, ever had any legal force or effect at Paris, France, or elsewhere.

(*e*) Alleges that at the time of the said alleged services of said alleged subpœnas defendant refused to accept the same, or either of them.

Alleges that in tendering said Five Hundred Dollars ($500.00) to defendant, said Davis did not inform defendant that the same was for his necessary expenses in traveling to and from the place at which this Honorable Court sits and/or for his expenses thereat.

Alleges that in tendering said Five Hundred Dollars ($500.00) to defendant, said Orr did not inform defendant that the same, or any part thereof, was for his necessary or other expenses in attendance at Court.

(*f*) Alleges that said alleged subpœnas, and each of them, were not issued or served under the authority of said Act of Congress, or pursuant to any order of this Honorable Court under said Act of Congress; al-
62 leges that said alleged subpœnas, and each of them, contained no notice to defendant that the same were issued under authority of said Act of Congress and/or pursuant to any order of this Honorable Court; that neither the original nor a true copy of said Petition for Subpœnas, nor said Order for Subpœnas, was served as a part of or in connection with or to accompany said alleged services of said alleged subpœnas, nor either of them; that no due or lawful notice of any kind was ever furnished defendant that said subpœnas, or either of them, were issued and/or were served under authority of said Act of Congress and/or pursuant to any order of this Honorable Court.

6. Answering paragraph 6 of said Petition for Order to Show Cause, defendant

(*a*) Admits that said George Orr and said Raymond Davis made to the Clerk of this Honorable Court pretended returns of said alleged services of said alleged

subpœnas and of the alleged tenders of said moneys, as appears of record in said case (The United States vs. Harry F. Sinclair and Albert B. Fall, No. 43,324, Criminal Docket); admits that true copies of said alleged subpoenas and of said alleged returns thereof are attached to said Petition for Order to Show Cause, marked Exhibit A and Exhibit B therein, and are made a part of said Petition for Order to Show Cause.

(*b*) As to the allegation that "said consuls" made said pretended returns of said alleged services and of said alleged tenders, defendant has no knowledge or information thereof sufficient to form a belief, and therefore denies the same.

(*c*) Denies that said pretended returns of said alleged services and/or said alleged tenders, or any of them,
63 were due or lawful or that the same had or have any legal force or effect.

(*d*) Alleges that said pretended returns on their faces show that they were not due and lawful in that they show that defendant did not receive due or lawful notice that said alleged subpœnas, or either of them, and/or said alleged tenders, or either of them, were pursuant to said Act of Congress; and that defendant did not receive due or lawful notice that said moneys tendered by said Davis were for defendant's necessary expenses in traveling to and from the place at which this Honorable Court sits and for defendant's expenses in attendance thereat; and that defendant did not receive due or lawful notice that said moneys tendered by said Orr were for defendant's expenses in attendance at this Honorable Court.

(*e*) Alleges that the affidavit of service required by paragraph 3 of Law Rule 19 of this Honorable Court was not made.

7. Answering paragraph 7 of said Petition for Order to Show Cause, defendant

(*a*) Admits that the trial of said case, Criminal No. 43,324, commenced in this Honorable Court at 10 o'clock A. M., Monday, October 17, 1927, and proceeded until about 12:15 o'clock P. M., on said day; admits said Nathan Miller and George Gordon Battle represented themselves to be attorneys for defendant; admits that the Clerk called "H. M. Blackmer"; that defendant did not respond to said

call; that thereupon said Nathan Miller and said George Gordon Battle appeared (specially as hereinafter alleged) for defendant, and at the request of defendant, for the
64 purpose of stating that defendant was not present in court; admits that a true transcript of the remarks on that occasion of said Owen J. Roberts, this Honorable Court and said Nathan Miller is attached to said Petition for Order to Show Cause, is marked Exhibit C, and is made a part of said Petition for Order to Show Cause;

(*b*) Denies that defendant neglected or refused to appear; denies that said Nathan I. Miller and/or said George Gordon Battle, or anyone appeared for the purpose of stating or stated that defendant would not appear in answer to said subpœnas, or either of them; denies that said Nathan Miller and/or George Gordon Battle, requested the Court to have the Clerk call defendant as a witness; denies that the Court so instructed the Clerk; denies that defendant was called as a witness.

(*c*) Alleges that said Nathan Miller and said George Gordon Battle appeared specially in behalf of defendant for the sole purpose of explaining to this Honorable Court why the defendant was not there at said time, and then and there offered to make such explanation, but were not permitted by this Honorable Court so to do.

8. Denies each and every allegation in said Petition for Order to Show Cause not hereinbefore expressly admitted or denied.

And for a first further plea—

Defendant realleges the allegations contained hereinbefore as if here repeated at length; and

Alleges that said Order for Subpoenas and the alleged issuance and alleged services of alleged subpœnas pursuant thereto, referred to in paragraphs "2", "3",
65 and "5" of the said Petition for Order to Show Cause, and the pretended returns of such alleged services, referred to in paragraph "6" of the said petition, and the provisions of the Act of Congress of July 3, 1926, C. 762 (44 Stat. 835) pursuant to which said proceedings were alleged to have been taken, were and are null, void and of no force and effect because they are in conflict with the Constitution of the United States, especially the provision of the Fourth Amendment, providing that the right of the

people to be secure in their persons, houses, papers, and effects, against unreasonable seizures, shall not be violated; the Eighth Amendment, providing that excessive fines shall not be imposed, nor unusual punishments inflicted; the Sixth Amendment, providing that in all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation; the Sixth Amendment, providing that in all criminal prosecutions the accused shall enjoy the right of trial by jury; the Sixth Amendment, providing that in all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor, and of the Fifth Amendment, that no person shall be deprived of life, liberty or property without due process of law.

And for a second further plea—

Defendant realleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that said Petition for Order to Show Cause was not verified as required by Law Rule 17 and Equity Rule No. 8 of this Honorable Court.

And for a third further plea—

66 Defendant realleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that the said Order to Show Cause herein is too vague and indefinite to be readily understood and to acquaint defendant with the facts constituting the alleged contempt therein referred to, in the following particulars, to wit:—

Said Order to Show Cause does not specify a single fact constituting grounds for contempt or why the defendant should show cause.

Said Order to Show Cause recites "consideration" by this Honorable Court—

"of the petition heretofore filed by Peyton Gordon, United States Attorney for the District of Columbia, Atlee Pomerene and Owen J. Roberts, Special Counsel for the United States of America."

as the basis for the action therein taken.

But the Petition referred to is not described or identified in the above quoted language; and is not connected by reference or otherwise with this contempt action No. 16; nor

is there anything in said Order to Show Cause serving to place the petition referred to.

Alleges that if defendant is lawfully bound to conjecture which petition is referred to and that such conjecture must inevitably point to the petition herein described and referred to as said Petition for Order to Show Cause, then defendant alleges that it is impossible to tell from said Petition for Order to Show Cause whether the failure to respond to the alleged subpœna alleged to has been
67 served by said Orr, or the alleged subpœna alleged to have been served by said Davis, or whether both, is or are, the basis of this action.

Alleges that neither said Petition considered by this Honorable Court as aforesaid, whatever it may have been, nor a true copy thereof, nor any other petition of counsel above named for the United States, or any of them, accompanied said Order to Show Cause, or was ever duly or lawfully received in any manner by defendant.

And for a fourth further plea—

Defendant realleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that there is nothing in said Order to Show Cause to put the defendant upon due or lawful notice that said Order was issued in accordance with said Act of July 3, 1926, C. 782 (44 Stat. 835); that defendant has never been duly or lawfully informed of the facts constituting his alleged offense herein.

And for a fifth further plea—

Defendant realleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that there are no grounds shown in said Order to Show Cause or in said Petition for Order to Show Cause why the Marshal of the District of Columbia should be ordered to levy upon and seize the property of defendant within the United States of the amount and value of One Hundred Thousand Dollars ($100,000) and to hold the same for the purpose of satisfying any judgment that may be rendered against defendant in this proceeding.
68

And for a sixth further plea—

Defendant realleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that said Order to Show Cause was not accompanied with a copy of said Petition for Order to Show Cause, or an affidavit, or of any notice thereto subscribed; that defendant was not served with said copy; that the purported return of said Order to Show Cause does not show the fact;—all contrary to the provisions of paragraph 1 of Law Rule 19 of this Honorable Court.

And for a seventh further plea—

Defendant realleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that said Order to Show Cause was not published in the Washington Law Reporter, as required by paragraph 4 of Law Rule 19, of this Honorable Court.

And for an eighth further plea—

Defendant realleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that in alleged pursuance of the direction so to do contained in said Order to Show Cause, the Marshal of the District of Columbia on or about the 19th day of November, 1927, made a pretended levy upon and seizure of United States First Liberty Loan Bonds of the par value of $100,000., which were then, at all times since have been, and are now the property of this defendant; that in alleged pursuance of the direction so to do contained in the Order to Show Cause of this Honorable Court, dated December 26, 1928, in United States of America, Plaintiff, vs. Harry M. Blackmer, Defendant, Contempt No. 18, said Mar-
69 shal on or about the 7th day of January, 1929, made a pretended levy upon and seizure of United States First Liberty Loan Bonds of the par value of $100,000, which were then, at all times since have been, and are now the property of the defendant; that the levy and seizure aforesaid in said Contempt No. 18 was upon all of and upon the identical property levied and seized upon as aforesaid in this Contempt No. 16; that plaintiff has abandoned said levy and seizure in this Contempt No. 16.

And for a ninth further plea—

Defendant realleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that no affidavit in connection with the attachment of defendant's property ordered by said Order to Show

Cause was made to comply in statement with the provisions and requirements of Sec. 445 of the Code, as amended by the Act of Congress approved April 19, 1920,—contrary to the provisions of paragraph 1 of Law Rule 9 of this Honorable Court.

And for a tenth further plea—

Defendant realleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that had the testimony of defendant been available at the first trial of United States vs. Harry F. Sinclair and Albert B. Fall, Criminal Docket No. 43,324, and had it conformed to the expectations alleged in said Petition for Order to Show Cause, and had it been admissible, it would have served no practical purpose of said first trial of said Criminal Docket case No. 43,324 ended in a mistrial, and plaintiff suffered no injury through defendant's absence.

70 And for an eleventh further plea—

Defendant realleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that after the alleged service of the pretended subpœnas referred to in paragraph 5 of said Petition for Order to Show Cause, defendant, desiring to perform his legal obligations (if any), obtained opinions in that regard from several attorneys at law of high repute in the United States; that he was advised by each and all of said attorneys after full consideration, that he was not under any such obligation, but that on the contrary, said alleged services and the proceedings purporting to authorize the same, and the provisions of said Act of Congress, were unconstitutional and wholly void and of no force or effect for the reasons hereinbefore mentioned, and relying on such advices that the defendant did not appear according to the purported demand of said pretended subpœnas so allegedly served.

Wherefore defendant prays judgment that he is not guilty of contempt of Court, as charged in said Petition for Order to Show Cause, and directing the release of his property within the United States, heretofore seized or claimed to have been seized by the Marshal purporting to act pursuant to said Order to Show Cause, to wit: $100,000 par

value of First Liberty Loan Bonds, and that this proceeding be dismissed.

Dated, September 7, 1929.

GEO. GORDON BATTLE,
Attorney for Defendant,
Appearing as Hereinbefore Stated.

Fiat.

Sept. 16th, 1929.

Leave granted to file.

F. L. SIDDONS,
Justice.

71 *Joinder of Issue.*

Filed September 16, 1929.

* * * * * * *

And now comes the United States, by its attorneys, Leo Rover, United States Attorney for the District of Columbia, and Atlee Pomerene and Owen J. Roberts, Special Counsel for the United States of America, and joins issue with the defendant upon the allegations of fact contained in paragraphs 1, 2, 4, 5, sub-paragraphs a, b, c, d of 6, and 7 of the defendant's First Plea; and also joins issue with the defendant upon the allegations of fact contained in the defendant's Third Further Plea, Fourth Further Plea, Fifth Further Plea, Eighth Further Plea, Tenth Further Plea and Eleventh Further Plea.

LEO A. ROVER,
United States Attorney.
ATLEE POMERENE,
OWEN J. ROBERTS,
Special Counsel.

72 *Demurrer.*

Filed September 16, 1929.

* * * * * * *

And now comes the United States, by its attorneys, Leo Rover, United States Attorney for the District of Colum-

bia, and Atlee Pomerene and Owen J. Roberts, Special Counsel for the United States of America, and demurs to sub-paragraph e of the 6th paragraph of the defendant's First Further Plea, and also demurs to the defendant's First Further Plea, Second Further Plea, Sixth Further Plea, Seventh Further Plea and Ninth Further Plea, and says that the said Pleas are bad in substance.

LEO A. ROVER,
United States Attorney.
ATLEE POMERENE,
OWEN J. ROBERTS,
Special Counsel.

NOTE.—Among the matters of law intended to be argued in support of the foregoing Demurrer are the following:

1. The provisions of paragraph 3 of Law Rule 19, the provisions of Law Rule 17 and Equity Rule 8, the provisions of paragraph 1 of Law Rule 19, and the provisions of paragraph 4 of Law Rule 19, all of the Supreme Court of the District of Columbia, are inapplicable to the present contempt proceeding.

2. The Act of July 3, 1926, C. 762 (44 Stat. 835) does not violate in any manner the provisions of the Fourth,
73 Fifth, Sixth and Eighth Amendments to the Constitution of the United States or any other provisions thereof.

3. The Act of July 3, 1926, C. 762 (44 Stat. 835) is constitutional and binding upon the defendant.

4. The provisions of paragraph 1 of Law Rule 9 of the Supreme Court of the District of Columbia are inapplicable to the present contempt proceeding.

5. The aforesaid Pleas of the defendant are bad for other reasons on their face.

Memorandum.

September 16, 17, 1929.—Argument of case.

74 *Motion on Pleadings for Judgment.*

Filed September 17, 1929.

* * * * * * *

The defendant herein, by his attorneys appearing especially for that purpose only, having moved this Court to

vacate and set aside the Order to Show Cause herein, dated November 16, 1927, and all proceedings pursuant thereto on the ground that this Court had not and has not jurisdiction of the defendant or jurisdiction of this proceeding for the reason and upon the grounds mentioned in said motion and by order dated April 23, 1928, this Court having overruled and denied the said motion and giving the defendant leave to file his answer herein, and the defendant having filed his plea under protest pursuant to said order of April 23, 1928, reserving all his claims and rights in and under the said motion and the proceedings had thereon, and the United States Attorney for the District of Columbia and Special Counsel for the United States of America having filed on behalf of the United States a Joinder of Issue and a Demurrer, as appears by the record herein.

Now, therefore, the said defendant, reserving all his claims and rights under the said motion and the proceedings had thereon and subject to such protest and reservation, moves by his undersigned attorney upon all the pleadings, proceedings and record herein for judgment that he is not guilty of contempt of court and directing the release of his property within the United States heretofore seized or claimed to have been seized herein by the United States Marshal, and that this proceeding be dismissed upon the following grounds which appear upon the face of the pleadings, proceedings and record herein:

75 1. That the petition of May 13, 1927 herein for the issuance of the subpœnas therein described, hereinafter called said Petition for Subpœnas, shows on its face that it was and is wholly invalid, as any proper or other showing for the issuance of subpœnas directed to the defendant in accordance with the Act of Congress of July 3, 1926, C. 762 (44 Stat. 835), hereinafter referred to as said Act of Congress, for the reason that all allegations therein contained pretending to constitute such showing, are not based upon facts but upon mere unsupported, unverified beliefs of the petitioners; and the said petition for Subpœnas expressly admits that the defendant is beyond the jurisdiction of the United States; the presentation of and the action of this Court on said Petition for Subpœnas were entirely ex parte; the defendant was afforded neither due nor any other notice thereon nor due

nor any other opportunity to be heard therein; and the defendant never received said Petition for Subpœnas or any copy thereof or any due or other notice thereof pursuant to said Act of Congress or to any order of this Court or to any lawfully authorized action of any party whomsoever in or in connection with these proceedings or any of them.

2. The alleged subpœnas directed to the defendant as described in the said Petition for Subpœnas and each of them had nothing on the face thereof to indicate that such subpœnas or either of them were issued or served in any way pursuant to or under the authority of the said Act of Congress, but on the contrary each of the said subpœnas was in the identical form used in this and all other United States Courts before the passage of said Act of Congress and also since the passage of said Act in the usual

76 and ordinary cases in said Court in which the said Act of Congress is not invoked, and therefore the said defendant was not in any way notified by anything that appeared on the face of said subpœna that it was issued under or pursuant to the authority of the said Act of Congress, but on the contrary he was justified in believing from the face of the said subpœnas and from all the facts and proceedings connected therewith that the said subpœnas were the usual subpœnas issued in cases in this and all other United States Courts in which the said Act of Congress is not invoked or concerned; and that by reason of the foregoing the defendant was under no obligation to comply with the directions contained in the said alleged subpœnas.

3. The alleged service of the said subpœnas upon the defendant was wholly illegal, null, void and of no effect, because at the time of such alleged service of each subpœna the proper legal tender was not made to the defendant for his necessary traveling expenses and for his attendance at Court as required by the said Act of Congress, and that the said George Orr, in attempting and pretending to make the alleged tender of $500.00 did not inform the defendant that the same or any part thereof was for his necessary or other expenses in attendance at Court and that the said Raymond Davis in attempting and pretending to make the said alleged tender of $500.00 did not inform the defendant that the same was for his necessary ex-

penses in traveling to and from the place at which this Court sits and/or for his expenses thereat.

4. The said alleged subpœnas and each of them were not issued or served under the authority of said Act of Congress or pursuant to any order of this Court under
77 said Act of Congress; and said alleged subpœnas and each of them contained no notice to defendant that the same were issued under authority of the said Act of Congress and/or pursuant to any order of this Court; that neither the original nor any copy of said Petition for Subpœnas nor said order for subpœnas was served as a part of or in connection with or to accompany said alleged services of said alleged subpœnas or either of them; that no due or lawful notice of any kind was ever furnished defendant that said subpœnas or either of them were issued and/or were served under authority of said Act of Congress or pursuant to any order of this Court.

5. The said pretended returns on their faces show that the said alleged services of said subpœnas and/or the said alleged tenders were none of them due or lawful or had any legal force or effect in that the said returns show that the defendant did not receive due or lawful notice that said alleged subpœnas or either of them and/or said alleged tenders or either of them were pursuant to said Act of Congress and the defendant did not receive due or lawful notice that said moneys alleged to have been tendered by said Davis were for defendant's expenses in traveling to and from the place at which this Honorable Court sits and for defendant's expenses in attendance thereat; and that defendant did not receive due or lawful notice that the said moneys alleged to have been tendered by said Orr were for defendant's expenses in attendance at this Court.

6. The affidavit of service required by Paragraph 3 of Law Rule 19 of this Court was not made.

7. The said Order of Subpœnas and the alleged issuance and alleged services of the alleged subpœnas pur-
78 suant thereto and the said pretended returns and the provisions of the said Act of Congress pursuant to which said proceedings were alleged to have been taken and each and all of the proceedings were and are null, void and of no force and effect because they are in conflict with the Constitution of the United States, especially the pro-

visions of the Fourth Amendment providing that the right of the people be secure in their persons, houses, papers and effects against unreasonable seizures, shall not be violated; the Eighth Amendment providing that excessive fines shall not be imposed, nor unusual punishment inflicted; the Sixth Amendment providing that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation; the Sixth Amendment providing that in all criminal prosecutions the accused shall enjoy the right of trial by jury; the Sixth Amendment providing that in all criminal prosecutions the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor; and the Fifth Amendment providing that no person shall be deprived of life, liberty or property without due process of law.

8. The Petition for the Order to Show Cause herein was not verified as required by Law Rule 17 and Equity Rule 8 of this Court, and also the said Petition was insufficient to justify the issuance of the Order to Show Cause.

9. The said Order to Show Cause was and is too vague and indefinite to be readily understood and/or to acquaint the defendant with the facts constituting the alleged contempt therein referred to, in the following particulars: to-wit, the said Order to Show Cause does not specify a single fact constituting grounds for contempt or why
79 the defendant should show cause.

The said Order to Show Cause recites "consideration" by the Court

"of the Petition heretofore filed by Peyton Gordon, United States Attorney for the District of Columbia, Atlee Pomerene and Owen J. Roberts, Special Counsel for the United States of America"

as the basis for the action therein taken. But the petition referred to is not described or identified in the above quoted language and is not connected by reference nor otherwise with this Contempt Action No. 16 nor is there anything in said Order to Show Cause serving to place the petition referred to. If the defendant is lawfully bound to conjecture which petition is referred to and that such conjecture must inevitably point to the petition herein described and referred to as said petition for Order to Show

Cause, then it is impossible for defendant to tell from said petition for Order to Show Cause whether the failure to respond to the alleged subpœna alleged to have been served by said Orr, or the alleged subpœna alleged to have been served by said Davis, or whether both is or are the basis of this action.

10. Neither the said petition considered by this Court as aforesaid, whatever it may have been, for the Order to Show Cause, nor any copy thereof, nor any other petition of Counsel above named for the United States or any of them, accompanied said Order to Show Cause or was ever duly or lawfully received in any manner by the defendant.

11. There is nothing in said Order to Show Cause
80 to put the defendant upon due or lawful notice that the said Order to Show Cause was issued in accordance with said Act of Congress, and the defendant has never been duly or lawfully informed of the facts constituting his alleged offense herein.

12. There are no grounds shown in said Order to Show Cause or in said petition for Order to Show Cause why the Marshal of the District of Columbia should be ordered to levy upon or seize, or why the said Marshal did make an alleged levy upon and seizure of the property of the defendant within the United States of the amount and value of $100,000.00 and/or to hold the same for the purpose of satisfying any judgment that may be rendered against defendant in this proceeding.

13. The said Order to Show Cause was not accompanied with a copy of said petition for Order to Show Cause or an affidavit or of any notice thereto subscribed; the defendant was not served with said copy; that the purported return of said Order to Show Cause does not show the fact—all contrary to the provisions of Paragraph 1 of Law Rule 19 of this Court.

14. The said Order to Show Cause was not published in the Washington Law Reporter as required by Paragraph 4 of Law Rule 19 of this Court.

15. No affidavit in connection with the attachment of the defendant's property ordered by said Order to Show Cause was made to comply in statement with the provisions and requirements of Section 445 of the Code, as amended by the Act of Congress approved April 19, 1920—contrary to the

provisions of Paragraph 1 of Law Rule 9 of this Honorable Court.

Wherefore and upon the foregoing grounds, the defendant moves on the pleadings, proceedings and record
81 herein for judgment that he is not guilty of contempt of Court and directing the release of his property within the United States heretofore seized or claimed to have been seized herein by the United States Marshal and that this proceeding be dismissed

Dated September 16, 1929.

GEO. GORDON BATTLE,
Attorney for Defendant,
Appearing as Hereinbefore Stated.

82 *Opinion of Siddons, J.*

Filed December 30, 1929.

* * * * * * *

The Court. So far as that rule is concerned, of course, it is controlled by the acts of the legislature. We have more than one example where Congress has prescribed what publication shall take place, and we are not following out our rule. Of course, our rules can be displaced at any time by an act of Congress. They have been more than once. Our standing rules do remain the law, provided they are within the competency of this Court, under the general powers conferred upon it by the Congress to make rules. And if our rules, promulgated in pursuance of the authority thus given, are within the scope of the authority conferred by the legislature, they are as much the law to be applied in the court as any statute. When Congress says, for instance, that publications in this classification shall be thus and so, then our rule gives place to the legislative command.

In this case the Walsh act prescribes publication in a newspaper, not in the Washington Law Reporter. Congress has a right to do that, and displace our rule in that regard. I do not think this court would be justified in saying, in view of this detailed language of the statute, "Well, we are going to require some further and additional publication. We are going to require publication in the

Paris edition of the New York Herald, or the Paris edition of the New York Times. We will require publication in a paper somewhere else—the original home of the respondent here—and we will require it in the Washington
83 Law Reporter." Congress says that publication in some newspaper is enough, and that was done. So, I do not think there is any merit in that contention.

Very briefly going over the matter, of course, a trial court ought to approach a charge of the unconstitutionality of an act of Congress with very great caution and care. We are all familiar with certain canons—shall I call them?—that have been laid down with respect to questions involving the constitutionality of an act of the legislature. There are not wanting those who have said—not courts, but textbook writers—that inferior courts, at least, ought never to undertake to declare an act of the legislature unconstitutional, but should pass it on to the reviewing authority. When I say "inferior courts" I am not referring to an inferior court of general jurisdiction, such as this is. Of course, we are inferior to the Court of Appeals, and we are inferior to the Supreme Court of the United States. We are a court of general jurisdiction, and that jurisdiction includes all the normal powers of a state court of original jurisdiction plus all the powers of a Federal circuit court, and the old Federal circuit in its original form, when it was simply a trial court. We have, in addition, a jurisdiction possessed by no other court in the country that I know of, and we exercise it, for no other reason, I suppose, than that we are here in the Nation's Capital, and can review certain appropriate cases of executive action and indirectly, at least, we can stay the hand of the President. I do not mean to say by direct process against the President, although that question, on civil process, has never been finally determined. As to the heads of departments exercising for the President the executive authority he sees fit to confer upon
84 them, plus certain specific authorities that some of the heads of departments exercise by reason of special acts of Congress, this court can hand down an injunction, a writ of prohibition, or the like, and either prevent or coerce appropriate action by heads of departments who, after all, are acting for the Executive, the President of the United States

This court never hesitates, in a proper case, to declare an act unconstitutional, but it should proceed to the consideration of such contention as to unconstitutionality with great care and caution. If in doubt about the matter this court, I think, ought to sustain the constitutionality of the act and let the reviewing authority determine upon the accuracy or inaccuracy of the court's decision in that regard.

We have before us in this case an unusual piece of legislation, unusual in the sense that, so far as we know, it has no analogous precedent in our legislative history; but that would not make it unconstitutional. It would be a sorry day for us, I think, when new conditions, new problems that occur out of our ever-changing and ever more complicated social order do not require new exercise of powers that we ought to consider, if we can, are within the constitutional competency of that branch of the government that may be undertaking to act in a given case.

Now, in this case, I am obliged to say to counsel for the respondent here that I most certainly consider that among the objections originally made to the constitutionality of this act by him was the claim, or the contention, that in terms, apparently, this Walsh act did not confer the same rights upon a defendant in a criminal case as it gives to the prosecution. I distinctly remember the able brief
85 that was filed in behalf of the respondent in that regard, and the equally able reply on that point of the contention. I think that so far as the constitutionality of this act is concerned, this court remains in the same position as it was before. Counsel for the respondent should look for any correction of that judgment, of course, if it is wrong, to the reviewing court.

As to these other matters, our subpœna, if you will read it carefully, is, in a sense, a command of the President of the United States. It is a command of the President of the United States to the person named as a witness, and it is attested by the Chief Justice of this Court. That is the form in which the subpœna is issued, and, so far as I know, it has always been in that same form in criminal cases. All our subpœnas, in detail, run in that way, as I recall it. Is not that so, Mr. District Attorney?

Mr. Rover: Yes, your Honor.

The Court: I have here a copy of the subpœna issued in this case.

Mr. Roberts: It is Exhibit A of the petition.

The Court: It is just as I recall:

"The President of the United States to H. M. Blackmer, Paris, France:

"You are hereby commanded to attend the said court," and so forth.

The President of the United States is commanding this respondent to attend this court in a case the title of which is set forth, the United States on the one hand, and two defendants on the other. The case is identified by the number of the criminal docket, and the case is identified as effectually as I think it could be identified. The President of the United States commands Blackmer to attend this court on Monday, April 2, 1928, at ten o'clock a. m., to testify on behalf of the United States "and not depart the Court without leave of the Court or Dsitrict Attorney.

86

"Witness, The Honorable Walter I. McCoy, Chief Justice of said Court, January 12, 1928."

The seal of the court is attached, and the clerk, or his deputy, signed it.

Now, then, what intelligent person reading that subpœna could possibly doubt what was expected of him? It was to attend as a witness on behalf of the United States, in a case against the parties named in the title of the suit in the subpœna, to testify on behalf of the United States in this court. He is commanded by the President of the United States to be here on the second day of April, 1928. A copy of that subpœna was served upon him. The consul's return reads:

"George Orr, summoned personally all, the first day of February, 1928.

"H. M. Blackmer, by exhibiting said subpœna personally to the said H. M. Blackmer, reading the same to him and leaving a duplicate copy with him at Paris, France.

"I further certify that pursuant to the order of the court I did at the time of said service tender to the said H. M. Blackmer the sum of five hundred dollars currency of the United States of America, which tender the said H. M. Blackmer then and there refused."

That was the amount declared by this court, acting under specific provisions of the Walsh Act, to be the amount that was regarded as a reasonable one to meet his ex-
87 penses in coming to the court. Does it require the consular officer to specifically state in his return that the $500 was for that purpose, or was ordered by the court prior to the issue of the subpœna? To do so would unnecessarily encumber the records of this court with matter that really does not go to the safeguarding of a written summons under these circumstances at all.

I think I can appropriately say that he could not have supposed that it was a Christmas gift by the President of the United States to him. Probably he had a right to refuse to come unless his mileage was provided, and perhaps his witness fees as well, for the time he would be expected to be in attendance upon this court. I should hesitate very much to hold a person in contempt who, having the subpœna served upon him, said to the officer, "Where are my witness fees? Where is my mileage? Have I got to go from Paris, France, to Washington, D. C. at my own expense?"

It is not suggested that he made any such demand. In the absence of such a demand, the service is perfectly clear. Then contempt proceedings may be predicated on violation of the command of the subpœna, even though the witness fees and mileage were not tendered. There is no suggestion that the witness, in pursuance of his rights, said "Where are my expenses? Where is my mileage, if you are going to drag me from Paris to Washington." He did not do it. There is no suggestion of it. So, I do not think that ground has merit for attack.

Now, as to the notice that this man received of what was going on here, first, he had the command to be here on April 2. It does not make any difference whether he had several other commands to appear on that day. He had this
88 command and he did not obey, according to the record. He did not come in obedience to that command to be here on April 2. What happened on April 2 in the way of continuing the hearing until a later date was none of his concern. He was required to be here on that day, and not to depart until this court or the district attorney gave him permission. He did not come.

Upon his refusal, the fact is made known to this court and an application is made to this court for a rule to show cause.

It is plain here that the application, which took the form of a petition to this court, was not sworn to by counsel. That is not requisite so far as this witness is concerned, so long as he had notice of why he was commanded to be here.

The rule to show cause sets forth:

"Upon the motion of the United States of America, the defendant, H. M. Blackmer, is cited and admonished to appear before this court on the 25th day of February, 1929, at 10 o'clock a. m. and show cause, if any he has, why he the said H. M. Blackmer should not be adjudged guilty of contempt of court in neglecting, failing and refusing to obey the subpœna heretofore issued by said Court and served upon him to appear before this Court as a witness in the case of the United States vs. Harry F. Sinclair and Albert B. Fall, Criminal No. 43,324 on the docket of this Court, the circumstances of which are very fully set out in said motion of plaintiff filed herein and why the said H. M. Blackmer should not be fined and punished therefor according to law."

It is plain that that order does not make specific reference to the facts specifically that required his ap-
89 pearance on April 2. To say that he could have any doubt as to what this order to show cause meant would be to say that he has not the intelligence of a low-grade moron. I do not ascribe anything of the kind to Mr. Blackmer.

Then there is the command to the marshal to levy and seize upon the property of the said H. M. Blackmer "of the amount and value of One Hundred Thousand Dollars ($100,000.00) or so much thereof as may be found, and hold the same until further ordered by the Court for the purpose of satisfying any judgment that may be rendered against H. M. Blackmer in this proceeding."

That was in the nature of security against some penalty or fine that the Court might thereafter impose if it should become satisfied that he had wilfully refused to obey the commands of the rule to show cause. It does not follow that because so much was seized, therefore the fine would

be equivalent to what was seized. That would depend upon what was developed at the hearing. There might be some matters of excuse or justification, or at least of mitigation, that would affect materially, perhaps, the judgment of the court in imposing a fine, or the amount of the fine. I do not think there can be any objection to the sufficiency of that. He knew, too, from this rule to show cause, that the marshal had been ordered, this very day, to seize this property, of the amount and value of one hundred thousand dollars. He knew that.

He knew, too, by this order, that the marshal forwarded to the consul of the United States at Paris, the very consul who had served him with this subpœna, and to the consuls of the United States at any other place in France, or
90 in any other countries where said H. M. Blackmer may be, a copy of this order with a request that such consuls, or any one of them, shall make personal service thereof upon said H. M. Blackmer and make prompt return thereof to the Clerk of this Court, and that the marshal was directed to make personal service of this order upon the said H. M. Blackmer, if he is found in the United States, and make prompt return thereof to the Clerk of this Court.

If the contentions of the able counsel for the respondent here are well founded, it would be well nigh impossible in a proceeding of this kind to get a witness who is a citizen of the United States, who happened to be in a foreign country, into this court to testify.

As for notifying them in advance of applications of this kind, it is an invitation to exclude themselves from any such further orders. It is not to be done for a moment. The administration of justice has its practical aspects, based upon a knowledge of human nature, a knowledge of men and women in the United States, their weaknesses and foibles. Of course, it must always proceed within the Constitution. Every citizen has a right to the safeguards accorded him by that great institution.

We have a great many technicalities to deal with here. That word is sometimes abused. Technicalities may be very sound and substantial. The word is often used very loosely. We sometimes hear it said, "Oh, that case was decided on a technicality"—a technicality that may go to the very heart of the case.

At any rate, what have we? We have a criminal proceeding pending in this court, United States vs. Fall and
91 Sinclair. A witness, a citizen of the United States, at present absent in a foreign country, has personal knowledge of relevant material in the case thus being prosecuted. By the accumulation of other testimony the government may have proved a charge. Congress has declared in such a case, "Now, Mr. Citizen, when you are needed for such a purpose by the Government of the United States you must obey subpœnas therein, in obedience to this act."

I cannot discover that there was a single failure to observe the substantial provisions of this act; and that in so doing, Mr. Blackmer was fully informed. To burden and encumber the record with copies of petitions and motions would be unnecessary. It would be easy enough to have very full notice in the rule to show cause. He could have come on, if he wanted to, and he could then read the motion and petition. This Court said "You come here, sir, and meet this charge, a charge stated in the order, for violation of the subpœna served upon you."

No, Mr. Battle. You must convince some other court of the soundness of your position so far as your pending motion is concerned. The motion is overruled.

92 *Decree.*

Filed October 18, 1929.

* * * * * * *

And now, to wit, October 18th, 1929, the above entitled cause having heretofore come on for hearing before Siddons, J. on September 16th and 17th, 1929, upon petition and rule to show cause, amended plea, joinder of issue and demurrer; and after a full hearing upon the aforesaid pleadings and proofs and evidence adduced by the petitioner, United States, and the respondent, Harry M. Blackmer, and after full argument by counsel upon the demurrer and all questions of law, the petition that the above named respondent be adjudged in contempt is by the Court sustained and the respondent, Harry M. Blackmer, is accordingly found, adjudged and decreed in contempt of Court; and

therefore it is considered, adjudged and decreed by the Court that for his said offense the respondent, Harry M. Blackmer, pay a fine of Thirty thousand dollars ($30,000), together with all the taxable costs of this proceeding; and thereupon the said respondent, by his attorneys, notes an appeal to the Court of Appeals of the District of Columbia from the judgment of the Court in this case; whereupon the Court fixes the amount of bond for costs on appeal at Five hundred dollars ($500) in the above entitled cause, which said bond shall be expressly conditioned that the property of the respondent (being United States Liberty Bonds of the par value of $100,000) heretofore levied upon and seized by the United States Marshal in Washington, D. C., under the order of November 16, 1927, of this Court, and now held by said Marshal to satisfy any judgment that may be rendered against the respondent in this proceeding, shall re-
93 main in the possession and custody of said United States Marshal under said levy and seizure pending the said appeal, and upon the entry of such bond there shall be a stay of proceedings; and in case the judgment appealed from shall be affirmed or the appeal shall be dismissed for any cause, the Court directs that the United States Marshal shall forthwith proceed to sell such of the United States Liberty Bonds of the par value of $100,000 heretofore levied upon and seized under the said order of November 16, 1927, as shall be necessary to satisfy in full the said fine of $30,000, together with all the taxable costs of this proceeding, such sale to be conducted upon the notice required and in the manner provided for sales upon execution.

F. L. SIDDONS,
Justice.

Memoranda.

October 21, 1929.—Undertaking on appeal (supersedeas) $500 approved and filed.

November 8, 1929.—Time to file Bill of Exceptions extended to November 25, 1929, inclusive.

November 25, 1929.—Proposed Bill of Exceptions filed. Notice of time of presentation of Bill of Exceptions and acknowledgment of service.

94 *Assignment of Errors of Defendant Harry M. Blackmer.*

Filed December 18, 1929.

* * * * * * *

The Court erred:

(1) In overruling and denying on April 23, 1928, the motion made by Nathan L. Miller and George Gordon Battle, attorneys for defendant, specially appearing therefor, to vacate and set aside the Order to Show Cause of this Court dated November 16, 1927, and all proceedings pursuant thereto.

(2) In overruling and denying the motion of defendant, on each and every ground specified therein, made at the trial of said cause and prior to the introduction of any testimony, on all the pleadings and proceedings herein for judgment that he is not guilty of contempt as charged herein and directing the release of his property within the United States heretofore seized or claimed to have been seized by the United States Marshal, and that the proceedings be dismissed. (Motion appears at length in Transcript of record and is item No. 21 on the Designation of Record herein.)

(3) In overruling and denying defendant's supplemental motion for judgment on the ground that by the attempted seizure of the same bonds in Contempt No. 18 (United States vs. Harry M. Blackmer—In Contempt No. 18—In the Supreme Court of the District of Columbia Holding a Criminal term) the Government waived and abandoned its seizure in this Contempt No. 16.

(4) In overruling defendant's objection to the taking of any testimony in his absence.

(5) In overruling and denying, on each ground, defendant's motion made at the beginning of the taking of testimony as renewed at the close of the testimony in chief for the United States (Assignment herein No. 2).

95 (6) In overruling defendant's objection to the questions by the United States to the witness George Gordon Battle, during his cross-examination, relating to the state of mind of defendant with respect to certain let-

ters rogatory issued to take defendant's testimony in the case of United States of America, plaintiff, vs. Mammoth Oil Company, a Corporation of the State of Delaware, et al. defendants (in Equity 1431—U. S. Dist. Ct., Dist. of Wyoming).

(7) In overruling and denying defendant's motion made at the close of testimony of both sides that these proceedings be dismissed and that judgment be rendered on behalf of defendant, finding him not guilty of contempt and directing the release of his property, and dismissing these proceedings on each and every ground enumerated in the previous motions (Assignments herein Nos. 2 and 5).

(8) In overruling defendant's objection to any judgment being rendered in his absence.

(9) In declaring and adjudicating defendant to be in conet-mpt of this Court.

(10) In imposing a fine upon defendant of Thirty Thousand ($30,000) Dollars and costs.

(11) In charging the bonds (defendant's) in custodia legis with said fine and costs.

(12) In other respects apparent of record.

GEO. GORDON BATTLE,
Attorney for Defendant.

Service of copy of above assignments of error accepted this 18th day of Dec. 1929.

LEO A. ROVER,
U. S. Attorney.

96 *Designation of Record.*

Filed November 6, 1929.

* * * * * * *

Now comes Harry M. Blackmer, the appellant in the above entitled cause, and designates the parts of the record which he desires to have included in the transcript, said parts being considered sufficient for the determination of the questions raised on appeal, namely:

1. Petition by attorneys for the United States filed May 13, 1927, for issuance of subpœna to James E. O'Neil and H. M. Blackmer under Act of July 3, 1926, in the case of

United States v. Harry F. Sinclair and Albert B. Fall, Criminal No. 43,324.

2. Order dated May 13, 1927, granting subpœnas.

3. Subpœnas dated May 13, 1927, directed to H. M. Blackmer at Paris, France; with return of service and tenders endorsed thereon by George Orr and Raymond Davis, United States Consuls, respectively.

4. Petition of United States attorneys dated November 4, 1927, for rule in contempt and for seizure of property of H. M. Blackmer, including Exhibits A, B and C thereto attached.

5. Order of Siddons, J., dated November 16, 1927, directing defendant Blackmer to appear on Friday, January 6, 1928, and show cause why he should not be adjudged in contempt, directing Marshal to seize and hold his property up to $100,000, and directing publication of said order.

6. Proof of publication of above order.

7. Transcript of proceedings, showing the witness H. M. Blackmer was called and that his counsel explained
97 to the Court that said H. M. Blackmer would not be present.

8. Return of Marshal to order of November 16, 1927, with endorsements thereon, and schedule of levy by Marshal on first Liberty Bonds of the par value of $100,000, property of said H. M. Blackmer, with appraisal of said bonds.

9. Special appearance of Nathan L. Miller and George Gordon Battle, and motion of defendant to vacate order of November 16, 1927, with affidavits of George Gordon Battle dated December 30, 1927, and Henry M. Blackmer dated January 2, 1928.

10. Order of Siddons, J., continuing hearing on rule to February 27, 1928, later continued to March 3, 1928.

11. Memo docket entry showing hearing on motion to vacate.

12. Return showing service of copy of order of November 16, 1927, on H. M. Blackmer in Paris, France.

13. Opinion of Siddons, J., on motion of defendant to set aside order of November 16, 1927.

14. Order of Siddons, J., overruling motion to vacate

order of November 16, 1927, with leave for defendant to file answer within twenty days.

15. Original plea of defendant and appearance of Nathan L. Miller and George Gordon Battle.

16. Joinder in issue on defendant's first plea.

17. Demurrer to defendant's further pleas.

18. Amended plea by leave of Court.

19. Joinder in issue of the United States on certain paragraphs of defendant's first pleas; also to third, fourth, fifth, eighth, tenth and eleventh pleas. Demurrer of United States to first further pleas (paragraph six); also to first,
98 second, sixth, seventh and ninth further pleas.

20. Memo docket entry showing hearing and trial.

21. Motion of defendant on pleadings for judgment.

22. Opinion of Siddons, J.

23. Decree adjudging respondent in contempt and ordering payment of fine of $30,000 and costs; appeal noted in open court from said decree; bond for costs fixed at $500, bonds seized under attachment to remain in custody of marshal.

24. Undertaking on appeal.

25. Bill of exceptions.

26. Notice of submission of bill of exceptions for settlement and approval.

27. Memo, bill of exceptions settled and approved.

28. Bill of exceptions.

29. Assignment of errors.

30. This designation of record.

GEO. GORDON BATTLE AND
SHERLEY, FAUST AND WILSON,
Attorneys for Appellant, H. M. Blackmer.

(Endorsed.)

Service of a copy of the within Designation of Record is acknowledged this 6th day of November, 1929.

LEO A. ROVER,
Attorney for the United States.

99 *Memorandum.*

January 6, 1930.—Bill of Exceptions submitted.

Supreme Court of the District of Columbia, Wednesday, January 15, 1930.

The Court resumes its session pursuant to adjournment, Mr. Justice Gordon, presiding.

* * * * * * *

Now comes here the respondent by his attorney Geo. Gordon Battle, Esquire, and prays the Court to sign and make a part of the record his Bill of Exceptions taken during the trial of the case and submitted to the Court on the 6th day of January, 1930, which is accordingly done, *nunc pro tunc.*

100 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 99, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in Contempt Cause No. 16, wherein United States is Plaintiff and Harry M. Blackmer is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 29th day of January, 1930.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

101 In the Supreme Court of the District of Columbia,
Holding a Criminal Term.

In Contempt. No. 16.

THE UNITED STATES

vs.

HARRY M. BLACKMER.

Amended Bill of Exceptions.

Be it remembered that at the trial of this cause commencing September 16, 1929, and terminating September 17, 1929, before Honorable Frederick L. Siddons, Justice, holding Criminal Court Number 2, proceedings were had and rulings made by the Court and exceptions taken and allowed on behalf of defendant as follows:

There appeared on behalf of the United States, Atlee Pomerene and Owen J. Roberts, Esqs., special counsel, and Honorable Leo A. Rover, United States Attorney in and for the District of Columbia. On behalf of defendant, George Gordon Battle, Esq., of New York, New York, and Eugene D. Millikin, Esq., of Denver, Colorado.

Mr. Battle: In the first proceeding (Contempt No. 16) we have filed an amended plea and we served that on the Clerk some days ago and gave copies to Senator Pomerene and Mr. Roberts, asking permission to file that amended plea and we now move for leave to file that plea.

Mr. Roberts: I shall withdraw my objection to his filing the amended plea, agree that he may do it, and now file demurrers, replication and joinders of issue as before.

The Court: Now, Mr. Battle, you are submitting, and have had leave to file, a motion in No. 16 similar to the motion in No. 18, which asked for a dismissal of the case on all the pleadings.

Mr. Battle: Yes, sir; on the proceedings and the record.

The Court: That petition has been filed, formally
102 submitted, and the objection is sustained. The motion is denied.

Mr. Battle: I make the motion on each and every ground specified therein, and I respectfully except to the overrul-

ing of the motion on each ground, and ask that a separate exception be noted.

(Motion appears at length in transcript of record and is item No. 21 on the Designation of Record herein.)

Mr. Battle: I will now make a supplemental motion for judgment on the ground that by the attempted seizure of the same bonds in Contempt No. 18 the Government waived and abandoned its seizure in Contempt No. 16. There is a dilemma there. If the Government seized anything in Contempt No. 18, then it abandoned its seizure, under the authorities in Contempt No. 16. If there was nothing for it to seize, then its attempted seizure in Contempt No. 18 was a nullity. I make the motion, in Contempt No. 16, that by its attempted seizure in Contempt No. 18, it abandoned its seizure in No. 16.

The Court: When the parties are the same, and the plaintiff, or the prosecutor in this case, complains of two distinct offenses, or violations of the law, the defendant refusing to obey two distinct subpœnas at different times, the amount of property of his seized here may be applied to the penatly exacted of him in each of those cases. The objection is overruled.

Mr. Battle: Our position is that where the Government, in the same matter, seeks to levy upon one lot of bonds to the full value of that lot, and then, upon an identical cause of action, a second cause of action of an identical character, in the same matter, seeks to levy on that same lot again, it thereby abandons the first levy if the second levy is to be effective. It is one or the other horn of the dilemma.

I respectfully except to your Honor's ruling.

Mr. Battle: I also object to taking any testimony in Contempt No. 16 in the absence of the defendant.

103 The Court: The same ruling.

Mr. Battle: I understand your Honor makes the same ruling and grants me an exception.

Mr. Roberts: If your Honor please, will it be admitted that Consul Davis was the Consul of the United States?

Mr. Battle: Can you offer testimony of the same character?

Mr. Roberts: I can offer the same record proof as to Mr. Davis as was offered with respect to Mr. Orr, covering the

periods involved in that Contempt proceeding. The witnesses and certificates are here.

Mr. Battle: We accept Mr. Roberts' offer.

Mr. Roberts: Then the stipulation stands in lieu of proof?

Mr. Battle: Yes.

Mr. Roberts: In that event the Government again closes its case.

Mr. Battle: I renew the motion made at the beginning of the taking of the testimony (motion on pleadings and proceedings for judgment), on each ground, and respectfully except to the ruling of the Court on each ground.

The Court: I must rule against you.

Mr. Battle: We now offer evidence on the Eighth Further Plea, which alleges:

"That in alleged pursuance of the direction so to do contained in said Order to Show Cause, the Marshal of the District of Columbia on or about the 19th day of November, 1927, made a pretended levy upon and seizure of United States First Liberty Loan Bonds of the par value of $100,000, which were then, at all times since have been, and are now the property of this defendant; that in alleged pursuance of the direction so to do contained in the Order to Show Cause of this Honorable Court, dated December 26,

104 1928, in United States of America, plaintiff, vs. Harry M. Blackmer, defendant, Contempt No. 18, said Marshal on or about the 7th day of January, 1929, made a pretended levy upon and seizure of United States First Liberty Loan Bonds of the par value of $100,000, which were then, at all times since have been, and are now the property of the defendant; that the levy and seizure aforesaid in said Contempt No. 18 was upon all of and upon the identical property levied and seized upon as aforesaid in this Contempt No. 16; that plaintiff has abandoned said levy and seizure in this Contempt No. 16."

I will ask leave to submit proof, unless the Government counsel will stipulate to that effect, that the bonds alluded to in this Eighth Further Plea were the property of the defendant, Harry M. Blackmer, and that they were the same identical bonds that were seized in both proceedings. There is no question about that, as I understand it.

Mr. Roberts: So, I think I can withdraw the objection and let those facts be stipulated as facts, and argue the legal conclusions that arise from them.

Mr. Battle: We understand, then, your Honor, that it is stipulated that the bonds mentioned in the Eighth Further Plea were and are the property of Mr. Harry M. Blackmer, the defendant, and that the same lot of bonds was seized in both proceedings, Contempt No. 16 and Contempt No. 18.

Mr. Battle: We now go on to the Tenth Further Plea as follows:

"That had the testimony of defendant been available at the first trial of United States vs. Harry F. Sinclair and Albert B. Fall, Criminal Docket No. 43,324, and had it conformed to the expectations alleged in said Petition for Order to Show Cause, and had it been admissible, it would have served no practical purpose for said first trial
105 of said Criminal Docket Case No. 43,324 ended in a mistrial, and plaintiff suffered no injury through defendant's absence."

Mr. Roberts: You wish to prove that the first Sinclair trial ended in a mistrial?

Mr. Battle: Correct.

Mr. Roberts: That being the trial for which the subpœna in this case was issued.

Mr. Battle: Yes.

Mr. Roberts: If you will admit that it ended in a mistrial after Mr. Blackmer was called in open court and failed to respond and you and Governor Miller stated that he would not be present, and you desired to explain why not, I will state that it did thereafter end in a mistrial.

Mr. Battle: That is correct.

Mr. Roberts: All right. Let the stipulation be taken.

The Court: Of course, there is a conclusion here, "and plaintiff suffered no injury through defendant's absence."

Mr. Battle: That is a conclusion, we do not ask for any concession to that, of course.

Mr. Roberts: We merely stipulated that it ended in a mistrial after the witness failed to appear.

Mr. Battle: We claim that as a consequence, but we do not claim it to be a provable fact.

Mr. Battle: The Eleventh Plea, in which Blackmer offers, as a defense, that he acted under advice of counsel was covered by evidence already submitted in Contempt No. 18. I will ask our friends to stipulate——

Mr. Roberts: May it be stipulated on the record that Mr. Battle's examination and cross examination in Contempt No. 18 may be considered as if regiven in this case?

Mr. Battle: That is what I was going to suggest.

106 Mr. Roberts: I agree.

The examination and cross-examination referred to was as follows:

"Mr. Battle: If your Honor please, I now will take up the Eleventh Further Plea. The issue is joined on that. That plea reads:

"'That after the alleged service of the pretended subpœna referred to in paragraph 5 of said Petition for Order to Show Cause, defendant, desiring to perform his legal obligations (if any), obtained opinions in that regard from several attorneys-at-law of high repute in the United States; that he was advised by each and all of said attorneys after full consideration, that he was not under any such obligation, but that on the contrary, said alleged service and the proceedings purporting to authorize the same, and the provisions of said Act of Congress were unconstitutional and wholly void and of no force for the reasons hereinbefore mentioned, and relying on such advice defendant did not appear according to the purported demand of said pretened subpœna so allegedly served.'

"Whereupon **George Gordon Battle** was called as a witness on behalf of defendant, and, having been first duly sworn, testified as follows:

"My name is George Gordon Battle. I am an attorney-at law, and have been practicing for about forty years.

"Mr. Pomerene: We will admit that the witness is eminent counsel.

"The Court: I think there is no question as to Mr. Battle's qualifications. I assume that special counsel are

107 agreed that he is a qualified witness.

"Mr. Pomerene: Certainly.

"Mr. Battle: I was in Paris, France, in the summer of 1927, just after these subpœnas had been served on Mr. Blackmer and saw Mr. Blackmer there at that time. I discussed with him the constitutionality of the Walsh Act and of the procedure under the Walsh Act, and advised with him as to what his action should be with respect to responding to the subpœna mentioned in the Petition for the Order to Show Cause in Contempt No. 18. I told him that we had considered very carefully the question of the constitutionality of the Walsh Act; that we had obtained opinions on it of several different lawyers, including Mr. Henry McAllister of Denver, Colorado, a lawyer of great distinction and eminence; Mr. Karl C. Schuyler, also of Denver, Colorado, a distinguished lawyer; Mr. George E. Holmes, of New York, a distinguished and well known lawyer of the New York Bar.

"The Court: Where was Mr. Blackmer's original native city or state?

"Mr. Battle: He came originally from Massachusetts, your Honor. He went West on account of his health when he was a young man, and went first to Cripple Creek, I think, in the early days, and Colorado Springs. He was an attorney-at-law there.

"The Court: Where was he living in the United States when he left the United States to go abroad?

"Mr. Battle: Denver. That was the occasion for my consulting these Denver counsel. I told Mr. Blackmer that the advice of all these lawyers, their opinions and my opinion, the opinion of Mr. Millikin, and of my own partners, all of whom had carefully examined the Act, was that the Act was unconstitutional and therefore that the sub-
108 pœna was not a valid obligation upon him. Mr. Blackmer said he wanted our advice and would rely upon it. I also told him that Senator Charles S. Thomas of Colorado had given an opinion that in his judgment the Walsh Act was entirely unconstitutional. Mr. Blackmer said he would depend upon and follow the advice we gave him at that time. Later, after the subpœnas issued and the proceedings had started, I told Mr. Blackmer that Governor Miller had examined the Act and that he gave the same opinion. I advised Mr. Blackmer that the Act was

unconstitutional, that it was void, and that the whole proceedings under it would be void.

"Cross-examination.

By Mr. Roberts:

"Mr. Battle: Mr. Blackmer was a lawyer and I was his counsel even considerably before this subpœna went out. I knew that letters rogatory were issued to take his testimony in the suit in Wyoming.

"Mr. Roberts: And you knew that he refused to give more than his name and age?

"Mr. Millikin: Your Honor, I object to the question as incompetent, irrelevant and immaterial. The Wyoming case is not in this proceeding.

"Mr. Roberts: I want to show this man's mind toward his Government, his willingness to serve it, and his unwillingness to serve it. If this is offered in mitigation, if your Honor please, your Honor has a right to know what this man's attitude was.

"Mr. Millikin: This is offered as a part of the pleadings and answer of this defendant. Under the testimony that has been permitted, it is not mitigatory at all.

"Mr. Roberts: It would be anything but mitigation. Your Honor is familiar with the Chapman case. Your
109 Honor is familiar with the Sinclair case, and the Cook case. The order of proof is immaterial here. We did not object to it because we knew he would be allowed to state it. It cannot be a defense when a man deliberately asks his lawyer to advise him, and says, 'on that advice I will not obey the order of the court.' That cannot be a defense. If that were true, every man who was ever summoned into court would get out of his obligation by hiring some lawyer and paying him, and taking his opinion that he did not have to come.

"The Court: I judge, from the character of the question put, to which objection is made, that it is designed to bring out the fact that Mr. Blackmer had refused any information about himself. As I understood the objection, he refused to give his name.

"Mr. Roberts: No. He gave his name and age, and then refused to answer any further questions.

"Mr. Millikin: If your Honor please, we object——

"The Court: Was this prior——

"Mr. Roberts: This was prior to this subpœna. It was in the suit of United States versus Mammoth Oil Company, Mr. Sinclair's company, of the District of Wyoming, in which the same plaintiff was seeking civil remedy on the same question for which it sought criminal remedy in this court.

"The Court: State your objection again, please, Mr. Millikin.

"Mr. Millikin: We object to the line of questioning for the reason that the suit referred to by Mr. Roberts has no connection whatever with these proceedings. Second, that the state of mind of the defendant in another proceeding has no relevancy to the issues in this case. Third, that the testimony being offered here is not by way of mitigation, but was a part of the defense set out in the answer
110 of this defendant, and that the objection comes too late. If we are going to go into what Mr. Blackmer's mind was in the Mammoth case at Cheyenne, that involves a very vast record that ought to be brought here so that we will know exactly what was said there, and to be properly introduced. I do not take it we are here for that purpose.

"The Court: As I understood the purport of the question on cross examination, it was merely designed to bring out the fact, from Mr. Battle, that Mr. Blackmer, the witness in this case, desired by the Government, was desired by the Government, as a witness in a civil proceeding.

"Mr. Millikin: Yes.

"The Court: At an earlier date, prior to these proceedings; and that beyond giving his name and age, he declined to testify in the case. I do not know under what circumstances; whether this declination of his occurred in the execution of letters rogatory.

"Mr. Roberts: I will ask Mr. Battle. He knows all about it. He can tell us.

"The Court: Suppose you do that.

"Mr. Roberts: Mr. Battle, you were Mr. Blackmer's counsel——

"Mr. Millikin: Has your Honor ruled on my objection?

"The Court: Not yet.

"Mr. Roberts: You were Mr. Blackmer's counsel when the case of United States vs. Mammoth Oil Company, and others, was being tried in the District Court of Wyoming, were you not?

"Mr. Battle: I was Mr. Blackmer's counsel.

"Mr. Roberts: And you were attending that trial as his counsel, and observing that trial for him throughout, were you not?

111 "Mr. Battle: At Cheyenne.

"Mr. Roberts: And you know that that was an equity case, founded on allegations of fraud and conspiracy against the Mammoth Oil Company, and asking for the cancellation of the Teapot Dome lease, do you not?

"Mr. Millikin: I object. I take it, your Honor, that my objection goes to all these questions.

"Mr. Roberts: These are preliminary.

"The Court: I had reserved ruling on your original objection because I made the suggestion to counsel that I wanted to know more about the circumstances under which it is said that Blackmer declined to testify in the civil suit, before I ruled on your objection as to the relevancy.

"Mr. Millikin: I would like to have the record show our objections to these preliminary questions, because they are bringing in and developing, through the answers of the witness, the very things we are objecting to.

"Mr. Roberts: Mr. Battle, answer my last question.

"The Court: I will overrule that objection.

"Mr. Millikin: I note an exception, your Honor.

"Mr. Battle: Yes, sir, I think that correctly states it. As Mr. Blackmer's counsel I am familiar with the fact that in the bill of the Mammoth Oil Company case, Mr. Sinclair was charged, amongst other things, with conspiracy with Mr. Fall, as in the criminal cases; that there was an application made to the United States District Judge at Cheyenne to take the testimony of Mr. Blackmer on the issues, amongst others, of conspiracy to defraud the United States; that letters rogatory were issued by Judge Kennedy, of that court, addressed to a French Court to examine Mr. Blackmer before them on certain questions propounded by the Government touching this alleged conspiracy.

112 "By Mr. Roberts:

"Q. And you know that you went abroad and advised with Mr. Blackmer at that time? A. I was abroad at that time.

"Q. And as a result of this, when the letters rogatory were exposed to Mr. Blackmer and the questions propounded to him by a French judge of a French court, he answered the first two questions, that his name was Harry M. Blackmer, and gave his age, and then said he refused to answer any further questions of the Government on the matter. That is correct, is it not? A. He declined to make any further answer, and the court sustained his declination.

"Q. Then, under your advice, he refused in the civil matter to give the Government the benefit of his testimony. Am I right? A. No; I advised him as to his legal rights."

"Mr. Millikin: It is now past the preliminary stage, if it please your Honor.

"The Court: Nothing is going in that affects your original objection, which is still pending and to be decided.

"By Mr. Roberts:

"Q. Coming to the question of this subpœna issuing out of this criminal court, you of course said to Mr. Blackmer that the penalty, if you should be wrong in your opinion, would be a contempt proceeding and punishment of him for contempt, did you not? A. He knew the provisions of the Act. I told him the provisions of the Act.

"Q. Therefore he was entirely familiar and you discussed the fact that if you and this other array of
113 legal gentlemen were wrong he must suffer the penalty? A. He knew the provisions of the Act. I cannot say we specifically discussed them.

"Q. Did you discuss what would probably be done to him if you were wrong in your views? A. I recall distinctly telling him what the provisions of the Act were, and to that extent——

"Q. Then so far as his action can be characterized, it was absolutely deliberate, was it not—after the fullest consideration? A. He gave it the most careful consideration.

"Q. Mr. Roberts, that is all, sir. A. That is all, sir.

"The Court: That brings us to the consideration of your original objection."

"Mr. Millikin: Will your Honor now rule on the objections as made?

"The Court: Your original objection?

"Mr. Millikin: Yes, your Honor.

"The Court: As the matter appeals to me, it is in this wise. We are hearing simply the allegations of contempt of the process of this court in this criminal proceeding, the refusal of the witness to obey the subpœna that was issued and served upon him; and the testimony that Mr. Battle has given us shows that in another and earlier proceeding, a civil proceeding in which, allowing for the difference between the one being civil and the other criminal, the basis of both is essentially the same. The charge was conspiracy to defraud. That was the indictment was it not? And that seems to have been the basis in part, at least, of the civil proceeding instituted, in which civil proceeding Blackmer was to be examined as a witness for the Government
114 and he declined to give his testimony. We do not have precisely the same situation. In one case we have Blackmer refusing in the criminal case to obey the subpœna issued by this court. Mr. Battle has given his testimony as to how that came about, that it was under his advice as counsel that Blackmer refused obedience to the summons. He has stated the reasons which actuated him in giving that counsel and advice to Blackmer.

"We have a rule of evidence that it seems to me is applicable here, that while we may not establish the guilt of a person in one case by reason of the fact that he has been guilty of similar acts, ordinarily, when the question on trial is one that involves intent, motive, purpose, a state of mind, then light is shed upon that state of mind by similar acts or substantially similar acts by the party involved; and the fact that in this somewhat earlier civil proceeding involving, as I have said, and as I understand the matter, practically the same predicate for the assertion by the Government in this civil proceeding that is made here in the indictment in this criminal case, it is competent to consider it with reference to whether as a matter of mitigation or as a matter of absolute defense it is a defense that should be

considered by the court in this case. I think the evidence is competent on cross examination.

"Mr. Battle: If your Honor will permit me to say that it might be inferred from what your Honor has said that your Honor was of the opinion that these other lawyers and myself had advised Mr. Blackmer not to obey the subpœna and not to come to court. That is not the fact.

"The Court: I did not think so. Your testimony was that you gave him your best opinion as to this Act and the proceedings under it.

"Mr. Battle: That is correct.

115 "The Court: I did not understand from your testimony that you, a lawyer and a member of the bar, told this man to violate a court order.

"Mr. Battle: None of the lawyers were asked on that point. We were asked to give our opinion on the constitutionality of that Act, and that we gave.

"The Court: I understand that; and I understood your testimony to be this, that having given your opinion that the Act was void, and therefore the proceedings under it were void——

"Mr. Battle: He asked us for our opinion and we gave it. I would also say in regard to the letters rogatory that Mr. Blackmer depended upon the opinion of French counsel that he was not under any obligation to answer the questions addressed to him in the French Court.

"Mr. Pomerene: That was under French jurisprudence.

"The Court: I remain of the opinion that counsel have not gone beyond the legitimate scope of cross examination in this case with respect to this single point, and I think your objection would be overruled.

"Mr. Millikin: I have an exception, please."

"By Mr. Millikin:

"Q. I would like to ask you, Mr. Battle, whether you did tell Mr. Blackmer that Senator Thomas, Mr. Schuyler, Mr. McAllister, Mr. Levy and Mr. Holmes had advised the same? A. I did.

"The Court: He did say that, and he has just now added that French counsel advised similarly.

"The Witness: As to letters rogatory; that being the proceeding in the French court.

"The Court: The French was the functionary authorized under our act of Congress to execute the letters rogatory.

116 "By Mr. Roberts:

"Q. Is it not the fact that French counsel advised that the French courts under their law had no power to compel Mr. Blackmer to reply, and that if he stood silent he could not be punished under the French law? A. The French counsel advised that he was under no obligation to answer.

"Q. Did they not advise that if he did not answer he could not be punished under French law? A. I do not recall that he did.

"Mr. Roberts: That is all."

Mr. Battle: If your Honor please, that closes our evidence in Contempt No. 16.

Mr. Pomerene: Now, if the Court please, we move for judgment for the Government against the defendant in each of these cases on pleadings and the evidence as submitted.

The Court: Before we come to that let me understand. You have no evidence to offer in reply,

Mr. Pomerene: No.

Mr. Battle: I move, if your Honor please, on behalf of the defendant, that these proceedings be dismissed, and that judgment be rendered on behalf of defendant, finding him not guilty of contempt and directing the release of his property, and dismissing these proceedings on each and every ground enumerated in the previous motions.

The Court: Your motion is overruled, Mr. Battle, for the dismissal of the whole proceedings now.

Mr. Battle: I respectfully except, and ask that an exception be noted to the denial of the motion on each ground, on each ground. I note a separate exception on each ground.

Then, for the purpose of the record, your Honor, I object to any judgment being rendered here in the absence
117 of defendant, to preserve my rights on that point.

The Court: On that ground, of course, your objection is overruled.

Mr. Battle: I except, your Honor, that exception goes to both proceedings, Contempt No. 16 and No. 18.

The Court: Yes.

The Court then proceeded to render its decision, saying in its opinion:

"The Court has no difficulty at all in determining that Mr. Blackmer has been guilty of contempt of this Court, and now formally declares and adjudicates Blackmer to be in contempt of this Court, under both proceedings, No. 16 and No. 18, which have been the subject of our consideration for the last two days."

The Court then proceeded to consider the penalty which should be imposed, saying:

"I think that in No. 16 the penalty that must be imposed is that of $30,000 and costs, and the funds or bonds in custodia legis will be charged with that fine of $30,000 in costs in No. 16; and in No. 18 the penalty is the same."

Mr. Battle: If your Honor please, I respectfully note an exception to the judgment of the Court and we will note an appeal, your Honor.

It was agreed that a supersedeas bond should be fixed in the sum of $1,000, with a proviso in the bond that nothing in it shall release the bonds from the present custody.

And be it remembered that:

The foregoing contains the substance of all the testimony given at the trial of said cause bearing upon the exceptions herein reserved on behalf of defendant, and each and all of the exceptions stated to have been taken by the de-
118 fendant were so taken, and were duly allowed by the Court and entered upon the minutes of the Court; and in order that each and all of said exceptions may be preserved and made a part of the record in this cause, this Bill of Exceptions is duly dated, approved, signed and or-

dered to be made of record in the above entitled cause this 15th day of January 1930.

F. L. SIDDONS,
Justice.

Approved:
LEO A. ROVER,
United States Attorney.
ATLEE POMERENE,
Special Counsel.
OWEN J. ROBERTS,
Special Counsel.
GEO. GORDON BATTLE,
Attorney for Defendant.

119 [Endorsed:] In the Supreme Court of the District of Columbia. The United States vs. Harry M. Blackmer. In Contempt. No. 16. Amended bill of exceptions. (Original.) George Gordon Battle, Attorney for Defendant, 37 Wall Street, New York City.

Endorsed on cover: District of Columbia Supreme Court. No. 5131. Harry M. Blackmer, appellant, vs. United States. Court of Appeals, District of Columbia. Filed Jan. 29, 1930. Henry W. Hodges, Clerk.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Monday, February 2nd, A. D. 1931.

* * * * * * *

It is ordered by the Court that, due to the disqualification of Mr. Chief Justice Martin, the Honorable Joseph W. Cox, Associate Justice of the Supreme Court of the District of Columbia, be, and he is hereby, designated to sit as a member of this Court in the hearing and decision of the following cases on its Calendar, namely, Nos. 5131, 5132, and 5171, January Term, 1931.

Charles H. Robb, Josiah A. Van Orsdel, Associate Justices.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Tuesday, February 3rd, A. D. 1931.

* * * * * * *

No. 5131

HARRY M. BLACKMER, Appellant,

v.

UNITED STATES.

and No. 5132

HARRY M. BLACKMER, Appellant,

v.

UNITED STATES

On motion, the Appellant is allowed to file a reply brief herein with leave to Appellee to reply, and the time for argument is enlarged to two hours on each side.

The argument in the above entitled causes was commenced by Mr. Karl C. Schuyler, attorney for Appellant, and was continued by Mr. Atlee Pomerene, attorney for the Appellee.

* * * * * * *

Wednesday, February 4th, A. D. 1931.

* * * * * * *

No. 5131

HARRY M. BLACKMER, Appellant,

v.

UNITED STATES

and No. 5132

HARRY M. BLACKMER, Appellant,

v.

UNITED STATES

The argument in the above entitled causes was continued by Mr. Atlee Pomerene, attorney for the Appellee, and was concluded by Mr. George Gordon Battle, attorney for the Appellant.

Mr. Chief Justice Martin took no part in the hearing of these cases.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Nos. 5131, 5132

HARRY M. BLACKMER, Appellant,

v.

UNITED STATES

(Before Robb and Van Orsdel, Associate Justices, and Cox, Associate Justice of the Supreme Court of the District of Columbia)

Mr. Justice ROBB delivered the Opinion of the Court:

In No. 5131 appellant, Harry M. Blackmer, was adjudged guilty of contempt of the Supreme Court of the District in failing to respond to a subpœna to appear on October 17, 1927, as a witness on behalf of the United States at the

trial of Harry F. Sinclair and Albert B. Fall in that Court on a criminal charge of having conspired to defraud the United States in violation of Sec. 39 of the Criminal Code.

In No. 5132, a mistrial of the Sinclair-Fall conspiracy case having been declared on November 2, 1927, appellant was again subpœnaed to appear on Monday, April 2, 1928, as a witness on behalf of the United States at the retrial of the case. Again he failed to appear. He was also found guilty of contempt of the Supreme Court of the District because of that failure.

The issuance and service of the subpœnas and the proceedings in each contempt case were under the provisions of the Act of July 3, 1926 (c. 762, 44 Stat. 835, U. S. C., Sup. IV, Tit. 28, Secs. 711-718).

Sec. 1 of that Act provides that whenever letters rogatory shall issue out of any court of the United States, addressed to any court of any foreign country, to take the testimony of any witness, he being a citizen of the United States or domiciled therein, and such witness, having been personally notified, neglects to appear, the court out of which such letters issued may authorize the issuance of a subpœna addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the court at a time and place therein designated.

The remaining sections read as follows:

"Sec. 2. Whenever the attendance at the trial of any criminal action of a witness, being a citizen of the United States or domiciled therein, who is beyond the jurisdiction of the United States, is desired by the Attorney General or any assistant or district attorney acting under him, the judge of the court before which such action is pending, or who is to sit in the trial of the same, may, upon proper showing, order that a subpœna issue, addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the said court at a time and place therein designated.

"Sec. 3. It shall be the duty of any consul of the United States within any country in which such witness may be at the request of the clerk of the court issuing any subpœna

under this Act or at the request of the officer causing such subpœna to be issued, to serve the same personally upon such witness and also to serve any orders to show cause, rules, judgments, or decrees when requested by the court or United States marshal, and to make a return thereof to the court out of which the same issued, first tendering to the witness the amount of his necessary expenses in traveling to and from the place at which the court sits and his attendance thereon, which amount shall be determined by the judge on issuing the order for the subpœna and supplied to the consul making the service.

"Sec. 4. If the witness so served shall neglect or refuse to appear as in such subpœna directed, the court out of which it was issued shall, upon proof being made of the service and default, issue an order directing the witness to appear before the court at a time in such order designated to show cause why he should not be adjudged guilty of contempt and be punished accordingly.

"Sec. 5. Upon issuing such order the court may, upon the giving of security for any damages which the recusing witness may have suffered, should the charge be dismissed (except that no security shall be required of the United States), direct as a part of such order that the property of the recusing witness, at any place within the United States, or so much thereof in value as the court may direct shall be levied upon and seized by the marshal of said court in the manner provided by law or the rule of the court for a levy or seizure under execution, to be held to satisfy any judgment that may be rendered against such witness in the proceeding so instituted.

"Sec. 6. The marshal, having made such levy, shall thereupon forward to the consul of any country where the recusing witness may be a copy of the order to show cause why such witness should not be adjudged guilty of contempt with the request that said consul make service of the same personally upon the recusing witness, and shall cause to be published such order to show cause and for the sequestration of the property of such witness, in some newspaper of general circulation in the district within which the court issuing such order sits, once each week for six consecutive weeks.

"Sec. 7. On the return day of such order or any later day to which the hearing may by the court be continued, proof shall be taken; and if the charge of recusancy against the witness shall be sustained, the court shall adjudge him guilty of contempt and, notwithstanding any limitation upon the power of the court generally to publish for contempt, impose upon him a fine not exceeding $100,000 and direct that the amount thereof, with the costs of the proceeding, be satisfied, unless paid, by a sale of the property of the witness so seized or levied upon, such sale to be conducted upon the notice required and in the manner provided for sales upon execution.

"Sec. 8. Any judgment rendered pursuant to this Act upon service by publication only may be opened for answer within the time and in the manner provided in Section 57 of the Judicial Code."

On May 13, 1925, in the court below, Sinclair and Fall were indicted for conspiracy to defraud the United States. On May 13, 1927, counsel for the United States filed in that court a petition stating that at the trial of the case they desired the attendance of appellant and another; that appellant was a citizen of and then beyond the jurisdiction of the United States; "that your petitioners believe and therefore aver that the attendance of the said persons at the trial of the said cause is vital and important to the United States, because as your petitioners aver, they believe that the said witnesses have knowledge and information with regard to certain important facts which the United States desires to prove in the said cause, and that their testimony as to said facts will be material in connection with the establishment not only of the conspiracy charged between the defendants in the above captioned cause, but in connection with the proof of overt acts done by the defendants pursuant to said conspiracy. More particularly your petitioners believe and therefore aver that the said * * * and H. M. Blackmer can testify to facts concerning the persons who were in the latter part of the year 1921 and during the year 1922 stockholders of the Continental Trading Company, Ltd., a corporation, and with regard to the distribution by that corporation to its stockholders of certain United States 3½ Liberty Loan

Bonds as dividends, certain of which bonds, as your petitioners believe and therefore aver, were subsequently delivered by or on behalf of one of the defendants, Harry F. Sinclair, to the other defendant, Albert B. Fall."

The petition further prayed the issuance of a subpœna addressed to any Consul General or Consul of the United States within the Republic of France, or within any country in which either of the witnesses might be, "commanding such witness to appear before this Court in Criminal Court No. 2, at the City of Washington, D. C., on the 17th day of October; 1927."

This petition was duly verified by Owen J. Roberts, Special Assistant to the Attorney General, and now an Associate Justice of the Supreme Court of the United States. On the same day the court ordered the subpœna to issue, and fixed and determined at $500 the amount to be tendered to each witness "for his necessary expenses in traveling to and from Washington, D. C., and for his attendance at Court." Thereupon a subpœna in regular form was issued, and on May 27, 1927, was served on appellant by George Orr, Consul of the United States at Paris, France; the consul's return reciting that the service was "at the usual residence of the witness * * *, 25 Avenue Montaigue, Paris, France, and in the presence of Consul Raymond Davis and Mr. Henri Gadd, Attorney for the witness. The witness declined to accept the sum of $500 in United States currency tendered him for traveling expenses. The original copy hereof was left in the hands of the witness." On June 7, 1927, another such subpœna was served on appellant by Raymond Davis, Consul of the United States at Paris, who tendered appellant "the sum of $500 currency of the United States of America" which tender likewise was refused.

On November 4, 1927, counsel for the United States presented a petition to the court below for a rule in contempt, setting forth in detail the proceedings culminating in the failure of appellant to appear as a witness. In addition to the order to show cause, it was prayed that the court direct that the property of appellant within the United States of the amount and value of $100,000, or such other amount and value as to the Court might seem proper, be levied upon and seized by the Marshal of the court "and

held to satisfy any judgment that may be rendered against the said H. M. Blackmer in this proceeding."

On November 16, 1927, the court, on consideration of the foregoing petition, issued an order directing appellant to appear before the court on January 6, 1928, to show cause why he should not be adjudged guilty of contempt and punished accordingly, and that the property of appellant to the amount and value of $100,000 be levied upon and seized by the Marshal to satisfy any judgment that might be rendered against appellant in the proceeding. The order directed that the Marshal of the court making the levy forward to the Consuls of the United States at Paris, France, or in any other countries where appellant might be, a copy of the order, with the request that such Consul or Consuls make service of the same personally upon appellant; and, further, that the Marshal should cause the order to be published in the Washington Evening Star once each week for six consecutive weeks, "in accordance with the provisions of Section 6, c. 762, of the Act approved July 3, 1926, 44 Stat. 835."

The Marshal made return that he had executed the order by levying upon and seizing $100,000 in United States First Liberty Loan Bonds at the par value of $100,000, the property of appellant; and George Orr, Consul of the United States at Paris, France, made return that on the 5th day of December 1927, he had "served a true copy of the within order on the within-named Harry M. Blackmer by delivering said true copy to him". After the levy there was a publication once a week for six consecutive weeks in the Washington Evening Star.

In No. 5132 the verified petition for the issuance of a subpœna was filed on January 9, 1928. The court directed the subpœna to issue, commanding appellant to appear on April 2, 1928. The subpœna issued and was served by Consul Orr on the 1st of February, 1928. $500 in currency was again tendered appellant, and was again refused.

On July 6, 1928, counsel for the United States filed a petition for a rule to show cause, setting forth the proceedings culminating in appellant's failure to respond to the subpœna. An order to show cause was issued but was not served. On December 26, 1928, an alias order was issued commanding appellant to show cause, if any he had, why

he should not be adjudged guilty of contempt of court for failing and refusing to obey the subpœna theretofore issued in the case of United States v. Sinclair and Fall. The order further directed the Marshal of the District to make a further levy upon property of appellant in the United States to the value of $100,000. The Marshal levied upon the same property which he had seized in the prior contempt proceeding. The order was served upon appellant personally by Consul Orr on the 21st of January, 1929, at Paris, France. After the levy there was a publication once a week for six consecutive weeks in the Washington Evening Star.

In each case counsel for appellant appeared specially and moved to vacate the order to show cause and proceedings thereunder, alleging the same to be in conflict with the Fourth, Fifth, Sixth, and Eighth Amendments to the Constitution. The motions were overruled. Whereupon, pleas were filed, on which the United States joined issue or demurred. The cases were heard together, and a fine of $30,000, and costs, adjudged in each case, to be satisfied out of the property seized, unless otherwise paid.

Counsel for appellant, both in brief and argument, have displayed a wealth of learning and great industry in the presentation of their very numerous contentions, but, in our view, the controlling question is whether it is Constitutional for Congress to authorize the service of a subpœna upon a citizen of the United States residing abroad. In determining this fundamental question, we should construe the statute, "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." United States v. Jin Fuey Moy, 241 U. S. 394, 401; Baender v. Barnett, 255 U. S. 224, 226; Panama R. R. Co. v. Johnson, 264 U. S. 375, 396; Michaelson v. United States, 266 U. S. 42, 64. In the Sinking-Fund cases, 99 U. S. 700, 718, the Court said:

"Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

Again, in Atkin v. Kansas, 191 U. S. 207, 223, the court said:

"We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution."

That the citizen, wherever he may be, and so long as he sustains that relationship, owes an absolute and permanent allegiance to his government, may not be denied. Carlisle v. United States, 16 Wall. 147, 154. He is entitled to the protection of his government, and in return the government is entitled to his unqualified allegiance. Minor v. Happersett, 21 Wall. 162, 166; Luria v. United States, 231 U. S. 9, 22.

In Rose v. Himely, 4 Cranch 241, 279, Mr. Chief Justice Marshall said:

"It is conceded, that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens."

In The Apollon, 9 Wheat. 362, 370, the court, speaking through Mr. Justice Story, said:

"The laws of no nation can justly extend beyond its own territories, except so far as its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction."

In United States v. Bowman, 260 U. S. 94, it was held that a criminal statute dealing with acts that are directly injurious to the Government and capable of perpetration without regard to particular locality, is to be construed as applicable to citizens of the United States upon the high seas or in a foreign country, though there be no express declaration to that effect; that citizens of the United States while in a foreign country are subject to penal laws passed by the United States to protect itself and its property. In

United States v. Bennett, 232 U. S. 299, it was held that the Government of the United States as a nation by its very nature benefits the citizen and his property wherever found, and that no imaginary barrier shuts that Government off from exerting the powers which inherently belong to it by virtue of its sovereignty. In Cook v. Tait, 265 U. S. 47, it was ruled that Congress has power to tax income received by a citizen of the United States domiciled abroad from property situated abroad.

In Bartue and Duchess of Suffolk's Case, 2 Dyer's Rep. 176, b, 73 Eng. Reprint 383, and in Knowles v. Luce, Moore's Rep. #(K. B.) 109, 72 Eng. Reprint 473, it was held that at common law the sovereign has a right to recall the subject or citizen from abroad and may seize and forfeit all his property if he refuses to return.

We think it logically follows from the foregoing authorities that a citizen of the United States, though residing abroad, is nevertheless amenable to process issuing under a statute requiring him to appear as a witness in a court of the United States, and that, if he receives reasonable notice and reasonable travelling and attendance fees, due process is satisfied. It is inconceivable that a citizen witness may clog the wheels of justice by crossing the international border and that the Government should be powerless to summon him to return and to subject him to a penalty if, without cause, he fails to respond to the summons.

The Act of 1926 makes it the duty of a citizen, residing abroad, to return when wanted as a witness, and prescribes the notice to be served upon him. In serving that notice the consul exercises no sovereign power. His notice is informative and not coercive. Mr. Chief Justice Taft, speaking for the Court in United States v. Bowman, 260 U. S. 94, 102, said:

"Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the government (of the United States) to which they owe allegiance."

So here, it is no offense to the dignity or right of sovereignty of France merely to notify an American citizen residing therein that he is wanted as a witness in a court of the United States. The consul who served the subpœna

was not acting in his consular or diplomatic character, but as a mere messenger of the Government of the United States. The Act might as well have authorized the Court to designate a messenger to serve the notice. Moreover, the record discloses no complaint on the part of France.

But appellant contends that the Act does not provide any valid method of acquiring jurisdiction to render a personal judgment against the defendant and his property; hence, that all proceedings authorized by the Act leading to the judgment against person and property, and all subsequent proceedings, are void as lacking due process.

Contempt proceedings "are sui generis—neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms—and exertions of the power inherent in all courts to enforce obedience, something they must possess in order properly to perform their functions. * * * While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offenses have been regarded as sui generis and not 'criminal prosecutions' within the Sixth Amendment or common understanding." Myers v. United States, 264 U. S. 95, 103, 104.

In Ex parte Grossman, 267 U. S. 87, 117, the court said:

"Contempt proceedings are sui generis because they are not hedged about with all the safeguards provided in the bill of rights for protecting one accused of ordinary crime from the danger of unjust conviction."

In Cooke v. United States, 267 U. S. 517, the court reaffirmed the ruling in Ex parte Terry, 128 U. S. 289, that when a contempt is committed in open court, it may be adjudged and punished summarily upon the court's own knowledge of the facts, without further proof, without issue or trial, and without hearing an explanation of the motives of the offender. The court then said (p. 536):

"When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and argument. The exact form of the procedure in the prosecution of such contempts is not

important. * * * Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation.

In the present case, proof was made that appellant did not respond to either of the subpœnas. Thereupon the court, in each case, issued an order directing appellant to appear at a fixed time to show cause why he should not be adjudged guilty of contempt and punished accordingly; and the order in each case also directed that the property of appellant "within the United States, of the amount and value of $100,000, be levied upon and seized by the Marshal of this Court *and held to satisfy any judgment that may be rendered* against the said Harry M. Blackmer in this proceeding." (Italics ours.)

In No. 5131 the order to show cause did not set forth the basis of the order. In No. 5132 appellant was specifically informed that he should show cause why he should not be adjudged guilty of contempt in neglecting, failing and refusing to obey the subpœna, theretofore issued by the court and served upon him, to appear before the court as a witness in the case of United States v. Harry F. Sinclair and Albert B. Fall. In the circumstances of this case we do not think appellant is in a position to complain because the charge in No. 5131 was not more specific. To determine whether a defendant has been sufficiently informed of the charges against him, the reviewing court may examine the entire record. Schwartz v. United States, 217 F. 966. Mr. Blackmer is a lawyer, was represented by counsel throughout, and the record leaves no room for doubt that he fully understood that the rule to show cause in each case was based upon his failure to respond to the subpœnas.

Moreover, at the trial of the contempt cases, evidence was introduced by counsel for appellant in supposed extenuation of the offense in each case and in mitigation of penalty. This amounted to a general appearance and appellant will not now be permitted to challenge the sufficiency of the rules to show cause.

In each instance property of the value of $100,000 was attached to satisfy any judgment that might be rendered

against appellant. As provided by Sec. 5 of the Act, appellant received personal notice in each instance, and in each instance there was service by publication as required by Sec. 6 of the Act. In each instance, the charge of recusancy against him having been sustained, the court, as required by Sec. 7 of the Act, adjudged him guilty of contempt and imposed the only penalty provided by that section, namely, a fine of not exceeding $100,000—to wit, $30,000 in each instance. These judgments were to be fully satisfied out of the property attached. It is, we think, plain that there has been no attempt in these cases to obtain a judgment in personam to be enforced in any other court than the court below or in any other respect than upon the property under the control of that court. The proceedings were quasi in rem, in which class of cases a judgment binds nothing but the property attached. Cooper v. Reynolds, 10 Wall 308; Pennoyer v. Neff, 95 U. S. 714, 730. The fact that Congress theretofore had not authorized such a procedure does not militate against the existence of the power to do so. In Big Vein Coal Co. v. Read, 229 U. S. 31, it was ruled that a Circuit Court of the United States has no jurisdiction to issue an order of attachment in a case where no personal service can be had upon the defendant and where there has been no personal appearance in the action, but the court was careful to say: "If Congress had intended any such radical change, it would have been easy to have made provision for that purpose, and doubtless a method of service by publication in such cases would have been provided."

It is not necessary, therefore, to determine whether Sec. 4 of the Act authorizes a personal judgment in the absence of the recusing witness nor whether the prescribed procedure would constitute due process. We are convinced that Congress would have authorized the procedure under Sec. 5 irrespective of Sec. 4. Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601, 635-636; El Paso & N. E. Ry. v. Gutierrez, 215 U. S. 87, 96; Southwestern Oil Co. v. Texas, 217 U. S. 114, 121.

Appellant advances the contention that the search and seizure of property authorized by the Act is unreasonable and violative of the Fourth Amendment. Reasonably construed, the Act does not contemplate or authorize an un-

reasonable search and seizure, and the records in these cases fail to disclose such a search and seizure. The Marshal's return in each case recites that he executed the order of the court "by levying upon and seizing One Hundred Thousand ($100,000) Dollars in United States First Liberty Loan Bonds at the par value of $100,000, the property of the said defendant, Harry M. Blackmer."

It further is contended that "by excluding defendants in criminal prosecutions from the right to extra-territorial subpœnas the Act violates that part of the Sixth Amendment of the United States Constitution providing that the accused in such actions shall have compulsory process for obtaining witnesses in his favor."

Sec. 1 of the Act provides that if a citizen of the United States while abroad refuses to respond to letters rogatory, the court out of which such letters issued may authorize the issuance of a subpœna for such citizen to appear before the court at the time and place designated. This section is available to either party in a civil action and to the defendant in a criminal action or in a contempt proceeding. Because of the provisions of the Sixth Amendment that the accused is entitled to be confronted with the witnesses against him, the United States is not entitled to letters rogatory in a criminal case. The defendant in such a case may have such letters and, if the witness refuses to respond, may have a subpœna. He has, therefore, substantially equal process to that accorded the United States. This is all that is required. In United States v. Heinze, 218 U. S. 532, the contention was advanced that the defendant in a criminal case was denied due process and equal protection of the law because he was not accorded rights to appeal equal to those accorded the prosecution. The contention was rejected.

In Blair v. United States, 250 U. S. 273, the plaintiffs in error had been adjudged guilty of contempt because of their refusal to obey a court order directing them to answer certain questions before a Federal grand jury, and committed to the custody of the Marshal until they should comply. On their refusal to answer the questions, the grand jury made a written presentment of the facts to the District Court, with the prayer that they might be dealt with as contumacious witnesses. Counsel for the witnesses

contended that the Corrupt Practices Act of June 25, 1910 (36 Stat. 822), was unconstitutional and void, and, hence, that the grand jury lacked authority to investigate supposed violations of that Act. In affirming the judgment, Mr. Justice Pitney for the Supreme Court said:

"In truth it is in the ordinary case no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not."

So here, it was the duty of appellant to respond to the summons, and it was not his function but that of the defendants in the criminal case to challenge the validity of the proceedings.

It is further contended that the Act violates the guarantee of due process under the Fifth Amendment "because it is arbitrary, capricious, unreasonable, indefinite and uncertain": first, because it makes "ownership of 'non-offending' property condition precedent to guilt of a criminal offense." Sec. 5, as we have already ruled, authorizes the quasi in rem proceeding whenever property of the recusing witness may be attached, but the contumacy of the witness depends not upon the ownership of property but upon the question whether he, without cause, failed to respond to the witness subpœna. Knowing that so long as the recusing witness remained abroad he could not be subjected to punishment, except through a fine levied upon his property located here, we think the provision was within the power of classification of Congress. As the court below observed:

"The provision of the statute for the sequestration of the property of such a witness within the territorial jurisdiction of the United States is analagous to the sequestration of property, not infrequently made, of a party litigant who otherwise, by the simple expedient of remaining out of the territorial jurisdiction of the court, may defeat the purposes of a suit or action."

Sec. 5 of the Act authorized the court to direct "that the property of the recusing witness, at any place within the United States, or so much thereof in value as the court may direct shall be levied upon and seized * * *, to be

held to satisfy any judgment that may be rendered against such witness in the proceeding so instituted." Under Sec. 7, the limit of the fine is $100,000. It must be assumed, therefore, that the court, in the exercise of a reasonable discretion, would not direct the attachment of more property than necessary to liquidate the authorized fine. The circumstances of each case also would be an element in the determination by the court of the amount of the property to be attached.

Since personal service was had in the present cases, it is unnecessary to consider Sec. 8.

Appellant further contends that the subpœnas directed to him were not issued upon proper showing, and, hence, violative of due process under the Fifth Amendment. Sec. 1 of the Act authorizes the court to issue a subpœna "upon proper showing" in cases where a witness had neglected to respond to letters rogatory. Sec. 2 provides that whenever the attendance, at the trial of any criminal action, of a witness who is beyond the jurisdiction of the United States, "is desired by the Attorney General or any assistant or district attorney acting under him, the judge of the court before which such action is pending, or who is to sit in the trial of the same, may, upon proper showing, order that a subpœna issue, * * *." It may be observed at the outset that it is for the court, in the exercise of a sound discretion, to determine whether a proper showing has been made, and not the recusing witness. That a proper showing was made in the present case is, we think, too plain to admit of doubt.

The Act of 1926 contains no requirement that the subpœna contain notice that it was issued under authority of the Act. It is to be presumed, therefore, that the ordinary form of subpœna was to be issued. Moreover, the records in these cases disclose that appellant had advised with counsel and was thoroughly familiar with the provisions of the Act. He not only was chargeable with knowledge of the Act, but was possessed of actual knowledge of the Act.

Appellant further contends that "the tenders of witness fees were insufficient and appellant was not bound to obey the subpœnas." In each instance the court, in conformity with the statute, fixed the amount to be tendered to appellant "for his necessary expenses in travelling to and from Washington, D. C., and for his attendance at Court," at

$500. In serving the first subpœna, Consul Orr tendered the $500 "for travelling expenses"; but in serving the second subpœna for attendance at the same trial, Consul Davis simply tendered $500; and Consul Orr, in serving the subpœna in No. 5132 tendered $500 without any limitation. Appellant in each instance, so far as the records disclose, refused each tender without asking any questions and without any protest. There is no evidence that the amounts of the tenders were insufficient. If appellant did not understand what they were for, he was lacking in intelligence. Being a lawyer and actually familiar with the provisions of the Act, it will be presumed that he knew the purpose and scope of the tenders.

The contention is made that there was an abandonment of the seizure in No. 5131 by the seizure of the same property in No. 5132, and authorities cited to the effect that if in a particular action an alias order is issued before property taken under the original writ is disposed of, the alias order destroys the lien acquired by the original writ. These cases are not in point, for here there were two different seizures in two different cases upon two different causes of action. The two different levies in these cases are not inconsistent with an intent on the part of the Government to maintain each.

In No. 5132 appellant was subpœnaed to appear on April 2, 1928, "and not depart the court without leave of the court or district attorney." The trial was continued and did not commence until April 9, 1928, when appellant was called as a witness and did not respond. He now contends that he was not subpœnaed to attend the court on April 9, 1928, and, hence, that all proceedings in No. 5132 under his alleged neglect and refusal to appear as a witness are null and void. The record shows that the Sinclair-Fall case was set for re-trial on April 2, 1928. For cause shown, the trial court extended the time for commencement to April 4th and again until April 9th, 1928. Had appellant obeyed the subpœna and presented himself on April 2, 1928, as required, he would have learned of the continuance and would not have been given leave to depart by either the court or the district attorney. As the court below observed, "What happened on April 2nd in the way of continuing the hearing until a later date was none of his concern."

Finally, appellant contends that "the fines adjudged in these cases, totalling the sum of $60,000 ($30,000 in each

case) are so grossly excessive as to amount to deprivation of property without the due process of law guaranteed by the Fifth Amendment."

When appellant was called as a witness on October 17, 1927, his counsel appeared and attempted to explain why he was not present. In their brief they state that it was desired to give assurance that appellant had no contempt for the court, nor for the judge thereof, nor for the valid laws of the United States; that appellant, in good faith, believed and had been advised that the law and procedure thereunder violated his constitutional rights as a citizen.

In support of appellant's motions to vacate the orders to show cause, his counsel filed appellant's affidavit, in which appellant stated "that in the year 1924 he left the City of Denver, State of Colorado, United States of America, resigning his position as Chairman of the Board of Directors of the Midwest Refining Company, and retired from business, taking up his residence at Hotel Plaza Athenee, in the City of Paris, France (although retaining his American citizenship); that thereafter and in the year 1926 he formed the intention of residing permanently abroad and then disposed of his former home in the said City of Denver, since which time he has at all times resided abroad, spending his time in England, in France and elsewhere."

At the trial of the contempt cases, George Gordon Battle, Esquire, of New York City, and Eugene D. Millikin, Esquire, of Denver, Colorado, appeared as counsel for appellant. During the course of the trial, Mr. Battle was called as a witness on behalf of the defendant (appellant here). He testified that he was in Paris, France, in the summer of 1927, just after the subpœnas had been served on Mr. Blackmer (dates of service: May 27, 1927, and June 7, 1927), and discussed with him the constitutionality and procedure under the Walsh Act (Act of July 3, 1926, 44 Stat. 835) and as to what his action should be with respect to responding to the subpœna; that the witness informed Blackmer that he (the witness) had carefully considered the question of the constitutionality of the Act and had obtained the opinions of several prominent lawyers concerning it; that he "advised Mr. Blackmer that the Act was unconstitutional, that it was void, and

that the whole proceedings under it would be void." On cross-examination, the witness stated that he was Blackmer's counsel "considerably before this subpœna went out. I knew that letters rogatory were issued to take his testimony in the suit in Wyoming." Over objection of counsel for appellant, the witness was questioned concerning the suit of United States v. Mammoth Oil Co. (5 F. (2d) 330; 14 F. (2d) 705; 275 U. S. 13), in which the United States was seeking civil remedy on the same question on which it sought criminal remedy in the conspiracy case in which appellant was subpœnaed. Mr. Battle testified: "As Mr. Blackmer's counsel I am familiar with the fact that in the bill of the Mammoth Oil Company Case, Mr. Sinclair was charged amongst other things, with conspiracy with Mr. Fall, as in the criminal cases; that there was an application made to the United States District Judge at Cheyenne to take the testimony of Mr. Blackmer on the issues, amongst others, of conspiracy to defraud the United States; that letters rogatory were issued by Judge Kennedy, of that court, addressed to a French Court to examine Mr. Blackmer before them on certain questions propounded by the Government touching this alleged conspiracy;" that when letters rogatory were exposed to appellant and the questions propounded to him by the French judge of the French Court, he (appellant) answered to his name, gave his age, and refused to answer any further questions. The witness was asked whether appellant then knew of the provisions of the Act, and he replied, "I told him the provisions of the Act." The witness further testified:

"I would also say in regard to the letters rogatory that Mr. Blackmer depended upon the opinion of French counsel that he was not under any obligation to answer the questions addressed to him in the French court."

The purpose of the testimony of Mr. Battle that appellant was advised by eminent counsel that the Act was unconstitutional was in supposed extenuation of the offense and in mitigation of the penalty. Sinclair v. United States, 279 U. S. 749, 766. Blackmer's good faith, therefore, was involved. Tornanses v. Melsing, 106 F. 755. As bearing upon his good faith, his attitude with respect to the letters

rogatory in the civil suit was important. It is clearly recognized that the giving of testimony is a public duty. Blair v. United States, 250 U. S. 273, 281.

It is further urged that the failure to respond to the subpœna at the re-trial (R., No. 5132) resulted in no inconvenience to the Government because other testimony became available for use at that trial, and, hence, that appellant's conduct was not disrespectful to the court. It ill becomes appellant, after he has persistently manifested an intent to evade his public duty and embarrass the Government, to say that his conduct was not contemptuous of the court because other evidence was available to the Government. The Government prevailed in the civil suit, notwithstanding his refusal to testify (Mammoth Oil Co. v. United States, 275 U. S. 13), but it did not prevail in the criminal case. The result might have been different had appellant fulfilled his duty.

Under the provisions of the statute, the court might have fixed the fine at $100,000 in each case. It was fixed at $30,000 in each case. Mr. Blackmer left the United States in 1924, when it must have been apparent to him that his testimony might and probably would be sought by the Government in the attempt to uncover the fraud and corruption culminating in the oil and gas lease to the Mammoth Oil Company. Later, letters rogatory were issued, but Blackmer refused to testify and could not be coerced. His hostile attitude and his disinclination to fulfill his public duty became apparent. When his testimony was sought in the criminal case involving substantially the came facts, he refused to respond to the subpœnas, and attemped to justify his conduct by challenging the constitutionality of the Act under which the subpœnas were issued. He knew, or should have known, that it was as much his patriotic duty to yield his testimony in the Government's efforts to uncover fraud and punish the guilty as it would be his duty to bear arms in defense of his country. Indeed, the injury to the Government resulting from the refusal of a material witness to testify might be infinitely greater than that resulting from his refusal to bear arms, and, yet, the citizen "may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convic-

tions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense." Jacobson v. Massachusetts, 197 U. S. 11, 29.

Doubtless Congress considered the possible serious consequences which might result from the refusal of a witness to respond to a subpœna when it authorized a penalty of $100,000 for each offense. It had a right to take into consideration that ordinarily only a man of means could afford the luxury of abandoning his business and practically expatriating himself by taking up his residence abroad. A small fine in such circumstances would have no deterrent effect. In the present cases, the records indicate that Mr. Blackmer is a man of extensive business interests and large means. Considering the records as a whole, we are clearly of the view that the trial court in assessing the fines did not abuse its discretion.

Other contentions have not been overlooked, but they have not been found of sufficient merit to warrant discussion.

The judgments are affirmed.

Affirmed.

Endorsed: Nos. 5131 and 5132. Harry M. Blackmer, Appellant, v. United States. Opinion of the Court per Mr. Justice Robb. Court of Appeals, District of Columbia. Filed April 6, 1931. Henry W. Hodges, Clerk.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, APRIL TERM, 1931

Monday, April 6th, A. D. 1931.

No. 5132

HARRY M. BLACKMER, Appellant,

v.

UNITED STATES

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia,

and was argued by counsel. On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed.

Per Mr. Justice Robb, April 6, 1931.

Mr. Justice Cox, of the Supreme Court, D. C., sat in this case in the place of Mr. Chief Justice Martin.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 110, inclusive, constitute a true copy of the transcript of Record and proceedings of the said Court of Appeals in the case of Harry M. Blackmer, Appellant, vs. United States, No. 5137, April Term, 1931, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Court of Appeals, at the City of Washington, this Fifteenth day of May, A. D. 1931.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. (Seal Court of Appeals, District of Columbia.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 19, 1931

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 201

HARRY M. BLACKMER, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED JULY 3, 1931

CERTIORARI GRANTED OCTOBER 19, 1931

(36,015)

(36,015)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 201

HARRY M. BLACKMER, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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Court of Appeals of the District of Columbia

No. 5132.

HARRY M BLACKMER, Appellant,

vs.

UNITED STATES.

a Supreme Court of the District of Columbia.

Contempt. No. 18.

UNITED STATES, Plaintiff,

vs.

HARRY M. BLACKMER, Defendant.

UNITED STATES OF AMERICA,

District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 In the Supreme Court of the District of Columbia,

Holding a Criminal Term.

In Contempt. No. 18.

UNITED STATES OF AMERICA, Plaintiff,

vs.

HARRY M. BLACKMER, Defendant.

Petition for Issuance of Subpœnas under the Act of July 3, 1926.

Filed Jan. 9, 1928.

In the Supreme Court of the District of Columbia, Holding a Criminal Term.

Criminal. No. 43324.

UNITED STATES

vs.

HARRY F. SINCLAIR and ALBERT B. FALL.

The petition of Peyton Gordon, United States Attorney in and for the District of Columbia, and of Atlee Pomerene

and Owen J. Roberts, Special Assistants to the Attorney General of the United States, respectfully represents:

1. The above captioned cause is set for trial before one of the Justices of your honorable Court on Monday, the 2d day of April, 1928. Your petitioners desire the attendance at the trial of the above captioned cause of James E. O'Neil and H. M. Blackmer. The said James E. O'Neil and H. M. Blackmer are citizens of the United States and are now beyond the jurisdiction of the United States, your petitioners being advised that they are, or both lately have been, in the Republic of France.

2. That your petitioners believe and therefore aver that the attendance of the said persons at the trial of the said cause is vital and important to the United States, because as your petitioners aver, they believe that the said witnesses have knowledge and information with regard to certain important facts which the United States desires to prove in the said cause, and that their testimony as to said facts will be material in connection with the establishment not only of the conspiracy charged between the defendants in the above captioned cause, but in connection with the proof of overt acts done by the defendants pursuant to said conspiracy. More particularly your petitioners believe and therefore aver that the said James E. O'Neil and H. M. Blackmer can testify to facts concerning the persons who were in the latter part of the year 1921 and during the year 1922 stockholders of the Continental Trading Company, Ltd., a corporation, and with regard to the distribution by that corporation to its stockholders of certain United States 3½% Liberty Loan Bonds as dividends, certain of which bonds, as your petitioners believe and therefore aver, were subsequently delivered by or on behalf of one of the defendants, Harry F. Sinclair, to the other defendant, Albert B. Fall.

3. That your petitioners base this petition upon the provisions of an Act of Congress, being No. 483 of the 68th Congress entitled "An Act relating to contempts", approved July 3, 1926.

Wherefore, your petitioners pray that your honorable Court, or one of the Justices thereof, may order that subpœnas issue in this cause addressed to any Consul General or Consul of the United States within the Republic of

France, or within any country in which either of the said witnesses may be, commanding such witness to appear before this Court in Criminal Court No. 2, at the City of Washington, D. C., on the 2d day of April, 1928

And your petitioners further pray that your honorable Court, or the Justice entering the order upon this petition, fix the amount which shall be tendered to the said witnesses respectively for their necessary expenses in travelling to and from the City of Washington, D. C., where this honorable Court sits, and the expenses of his attendance upon the Court; and your petitioners respectfully represent that $500.00 is a proper sum to be fixed in that behalf.

3 And your petitioners will ever pray, etc.

PEYTON GORDON,
United States Attorney.
ATLEE POMERENE,
OWEN J. ROBERTS,
Special Assistants to the Attorney General.

4 UNITED STATES OF AMERICA,
District of Columbia, ss:

Atlee Pomerene, having been duly sworn according to law, did depose and say that the facts set forth in the foregoing petition are just, true and correct to the best of his knowledge, information and belief.

ATLEE POMERENE.

Sworn to and subscribed before me this 9th day of January, 1928.

[NOTARIAL SEAL.] CARLTON G. SCHENKEN,
Notary Public, D. C.

Endorsed: Criminal. No. 43324. In the Supreme Court of the District of Columbia. United States vs. Harry F. Sinclair and Albert B. Fall. Petition for issuance of subpœnas under the Act of July 3, 1926.

5 *Order.*

Filed Jan. 9, 1928.

Upon consideration of the petition of Peyton Gordon, United States Attorney in and for the District of Columbia, and Atlee Pomerene and Owen J. Roberts, Special Assist-

ants to the Attorney General of the United States, this day filed praying for the issuance of subpœnas under the Act of July 3, 1926, it is by the Court this 9th day of January, 1928, ordered:

1. That subpœnas issued as prayed for in the said petition which subpœnas shall at the request of the petitioners be addressed to any consul of the United States in the Republic of France, or in any other country where said witnesses may be ascertained to be, commanding said witnesses to be and appear before this Court in Criminal Court No. 2 thereof, on the 2d day of April, 1928.

2. That the amount to be tendered to each of the said witnesses for his necessary expenses in traveling to and from Washington, D. C. and for his attendance at Court, is fixed and determined at $500.00.

(Signed) F. L. SIDDONS,
Justice.

Endorsed: Criminal. No. 43324. In the Supreme Court of the District of Columbia. United States vs. Harry F. Sinclair and Albert B. Fall. Order.

6 *Summons for the United States.*

In the Supreme Court of the District of Columbia.

No. 43324, Criminal Docket.

THE UNITED STATES
vs.
HARRY F. SINCLAIR and ALBERT B. FALL.

The President of the United States to H. M. Blackmer, Paris, France:

You are hereby commanded to attend the said court on Monday, April 2nd, 1928, at ten o'clock A. M., to testify on behalf of the United States, and not depart the Court without leave of the Court or District Attorney.

Witness the Honorable Walter I. McCoy, Chief Justice of said Court, January 12, 1928.

[SEAL.] FRANK E. CUNNINGHAM,
Clerk.

By R. E. BOUCHER,
Assistant Clerk.

(On the Back:) Criminal. No. 43324. United States vs. Harry F. Sinclair & Albert B. Fall. Summons for the United States Criminal Court No. 2. To George Orr, Consul of the United States, Paris France: By order of the Court, you are hereby directed to serve the within subpœna and true return thereon to make to this Court. Frank E. Cunningham, Clerk Supreme Court of the District of Columbia.

7 *Consul's Return.*

Summoned personally all, the first day of February, 1928. H. M. Blackmer, by exhibiting said subpœna personally to the said H. M. Blackmer, reading the same to him and leaving a duplicate copy with him at Paris, France.

And I further certify that pursuant to the order of the court I did at the time of said service tender to the said H. M. Blackmer the sum of five hundred dollars currency of the United States of America, which tender the said H. M. Blackmer then and there refused.

GEORGE ORR,
Consul.

1230
No fee prescribed.

8 *Petition for Rule to Show Cause.*

Filed Jul. 6, 1928.

In the Supreme Court of the District of Columbia, Holding a Criminal Term.

No. 18.

In Contempt.

UNITED STATES OF AMERICA, Plaintiff,

vs.

HARRY M. BLACKMER, Defendant.

And now come, Leo A. Rover, United States Attorney for the District of Columbia, and Atlee Pomerene and Owen J. Roberts, Special Counsel for the United States of America, and represent to the Court:

1. That on or about the 9th day of January, 1928, they presented their petition to this Honorable Court in accordance with the Act of Congress of July 3, 1926, C. 762 (44 Stat. 835) for the issuance of subpœnas directed to one H. M. Blackmer, who was and is a citizen of the United States to appear before this Honorable Court on Monday, April 2, 1928, as a witness in the case of The United States vs. Harry F. Sinclair and Albert B. Fall, Criminal No. 43324, on the docket of this Court and said petition now appears of record therein.

2. That on said 9th day of January 1928 this Honorable Court made an order based upon the said petition for the issuance of said subpœnas and on the 12th day of January, 1928, subpœnas were duly issued in accordance with the terms of the said Act of Congress and the said order of the court directed to the Consuls of the United States and foreign countries for service upon said H. M. Blackmer.

9 3. That said subpœnas commanded the said H. M. Blackmer to appear before this Honorable Court at a criminal term thereof in the City of Washington, District of Columbia, on Monday, April 2, 1928, at 10 o'clock a. m. to testify on behalf of the United States in said criminal case No. 43,324 and not depart the Court without leave of the Court or District Attorney.

4. That in order aforesaid it was specified that upon service of any of said subpœnas the Consul serving the same should tender to said H. M. Blackmer the sum of Five Hundred Dollars ($500) for his necessary expenses in traveling to and from the place at which said Court sits and his expenses in attendance thereat.

5. That on the first day of February 1928 George Orr, a Consul of the United States at Paris, France, served one of said subpœnas upon said H. M. Blackmer, at Paris, France by exhibiting the same personally to the said H. M. Blackmer, reading the same to him and leaving a duplicate copy with him at Paris, France. And said Consul at the same time tendered to the said H. M. Blackmer the sum of Five Hundred Dollars ($500.00) in currency of the United States of America, and the said H. M. Blackmer refused to take the said moneys, or any part thereof.

6. That said Consul above mentioned made due return of the service of said subpoenas and the tender of said money

as aforesaid to the Clerk of this Honorable Court, as appears of record in said cause, a true copy of said subpoena and return thereof are hereunto attached marked Exhibit "A," which copy is hereby made a part hereof.

10 7. That the trial of said case was continued by the Court to Monday, April 9, 1928.

8. That the trial of said criminal case No. 43,324 was commenced in this Court at 10 o'clock a. m. on Monday, April 9, 1928; that the said special counsel requested the Court to have the Clerk call the said H. M. Blackmer as a witness; that the Court so instructed the Clerk and the Clerk called "H. M. Blackmer"; that said H. M. Blackmer did not respond to said call and neglected and refused to appear.

Wherefore the said Leo A. Rover, United States Attorney as aforesaid, and said Atlee Pomerene and Owen J. Roberts, Special Counsel as aforesaid, pray this Honorable Court to issue an order in accordance with Section 4, C. 762 of the said Act of July 3, 1926, directing the witness, H. M. Blackmer, to appear before said Court upon a day and at a time to be designated in said order to show cause why he should not be adjudged guilty of contempt and punished accordingly.

And they further pray that this Honorable Court will direct as a part of said order and in accordance with Section 5, C. 762 of said Act of July 3, 1926, that the property of the said H. M. Blackmer within the United States of the amount and value of One Hundred Thousand Dollars ($100,000.00), or such other amount and value as to the Court may seem proper, be levied upon and seized by the Marshal of said Court and held to satisfy any judgment that may be rendered against said H. M. Blackmer in this proceeding.

And they further pray that this Honorable Court will direct as a part of said order and in accordance with Section 6, C. 762 of said Act that the Marshal, upon hav-

11 ing made such levy and seizure, shall forward to the Consuls of the United States in any countries where said H. M. Blackmer may be, a copy of said order for personal service upon said H. M. Blackmer, and shall cause said order to be published in a newspaper of general cir-

culation in the District of Columbia once each week for six consecutive weeks.

And your petitioner will ever pray, etc.

LEO A. ROVER,
United States Attorney for the District of Columbia.
OWEN J. ROBERTS,
ATLEE POMERENE,
Special Counsel for the United States.

12 EXHIBIT "A".

Filed Jul. 6, 1928.

Supreme Court of the District of Columbia.

No. 43324, Criminal Docket.

THE UNITED STATES

vs.

HARRY F. SINCLAIR and ALBERT B. FALL.

The President of the United States to H. M. Blackmer, Paris, France:

You are hereby commanded to attend the said court on Monday, April 2nd, 1928, at ten o'clock A. M., to testify on behalf of the United States, and not depart the Court without leave of the Court or District Attorney.

Witness, the Honorable Walter I. McCoy, Chief Justice of said Court, January 12, 1928.

[SEAL.] FRANK E. CUNNINGHAM,
Clerk,
By R. E. BOUCHER,
Assistant Clerk.

(On the back): Criminal. No. 43324. United States vs. Harry F. Sinclair & Albert B. Fall. Summons for the United States. Criminal Court No. 2. To George Orr, Consul of the United States, Paris, France. By order of the Court, you are hereby directed to serve the within subpoena and true return thereon to make to this Court. Frank E. Cunningham, Clerk Supreme Court of the District of Columbia.

Consul's Return.

Summoned personally all, the first day of February, 1928, S. M. Blackmer, by exhibiting said subpœna personally to the said H. M. Blackmer, reading the same to him and leaving a duplicate copy with him at Paris, France.

And I further certify that pursuant to the order of the court I did at the time of said service tender to the said H. M. Blackmer the sum of five hundred dollars cur-
13 rency of the United States of America, which tender the said H. M. Blackmer then and there refused.

GEORGE ORR,
Consul.

1230.
No fee prescribed.

14 *Order to Show Cause.*

Filed Jul. 6, 1928.

In the Supreme Court of the District of Columbia, Holding a Criminal Term.

In Contempt.

No. 18.

UNITED STATES OF AMERICA, Plaintiff,

vs.

HARRY M. BLACKMER, Defendant.

Order to Show Cause.

Upon the motion of the United States of America, the defendant, H. M. Blackmer, is cited and admonished to appear before this court on the 15th day of October, 1928, at 10 o'clock A. M. and show cause, if any he has, why he the said H. M. Blackmer should not be adjudged guilty of contempt of court in neglecting, failing and refusing to obey the subpœna heretofore issued by said Court and served upon him to appear before this Court as a witness in the case of the United States vs. Harry F. Sinclair and

Albert B. Fall, Criminal No 43,324 on the docket of this Court, the circumstances of which are very fully set out in said motion of plaintiff filed herein and why the said H. M. Blackmer should not be fined and punished therefor according to law.

It is ordered that the Marshal of this District levy upon and seize the property of the said H. M. Blackmer within the United States of the amount and value of One Hundred Thousand Dollars ($100,000.00), or so much thereof as may be found, and hold the same until further ordered by the Court for the purpose of satisfying any judgment that may be rendered against H. M. Blackmer in this proceeding.

It is further ordered that the Marshal of this District, upon having made such levy and seizure, shall forward to the Consul of the United States at Paris, France, and to the Consuls of the United States at any other place in France, or in any other countries where said H. M. Blackmer may be, a copy of this order with a request that such Consuls, or any one of them, shall make personal service thereof upon said H. M. Blackmer and make prompt return thereof to the Clerk of this Court, and that said Marshal shall make personal service of this order upon said H. M. Blackmer, if he is found in the United States, and make prompt return thereof to the Clerk of this Court, and that said Marshal, upon having made such levy and seizure, shall cause this order to be published in the Washington Evening Star, a newspaper of general circulation in the District of Columbia, once a week for six consecutive weeks, commencing as soon as possible after such levy and seizure, and cause the editor or publisher of such newspaper to make due return thereof upon the completion of such publication.

JENNINGS BAILEY,
Judge.

Dated July 6th, 1928.

Approved:

LEO A. ROVER,
United States Attorney for the District of Columbia.

OWEN J. ROBERTS,
ATLEE POMERENE,
Special Counsel.

16 *Alias Order to Show Cause.*

Filed Dec. 26, 1928.

* * * * * * *

Upon motion of the United States of America, the defendant, H. M. Blackmer, is cited and admonished to appear before this court on the 25th day of February 1929, at 10 o'clock A. M. and show cause, if any he has, why he the said H. M. Blackmer, should not be adjudged guilty of contempt of court in neglecting, failing and refusing to obey the subpœna heretofore issued by said Court and served upon him to appear before this Court as a witness in the case of the United States vs. Harry F. Sinclair and Albert B. Fall, Criminal No. 43,324 on the docket of this Court, the circumstances of which are very fully set out in said motion of plaintiff filed herein and why the said H. M. Blackmer should not be fined and punished therefor according to law.

It is ordered that the Marshal of this District levy upon and seize the property of the said H. M. Blackmer within the United States of the amount and value of One Hundred Thousand Dollars ($100,000.00), or so much thereof as may be found, and hold the same until further ordered by the Court for the purpose of satisfying any judgment that may be rendered against H. M. Blackmer in this proceeding.

It is further ordered that the Marshal of this District, upon having made such levy and seizure, shall forward to the Consul of the United States at Paris, France, and to the Consuls of the United States at any other place in France or in any other countries where said H. M. Blackmer may be, a copy of this order with a request that

17 such Consuls, or any one of them, shall make personal service thereof upon said H. M. Blackmer and make prompt return thereof to the Clerk of this Court and that said Marshal shall make personal service of this order upon said H. M. Blackmer, if he is found in the United States and make prompt return thereof to the Clerk of this Court, and that said Marshal, upon having made such levy and seizure, shall cause this order to be published in the Evening Star, a newspaper of general circulation in the

District of Columbia, once a week for six consecutive weeks, commencing as soon as possible after such levy and seizure and cause the editor or publisher of such newspaper to make due return thereof upon the completion of such publication.

WILLIAM HITZ,
Judge.

Dec. 26, 1928.

Approved:
LEO A. ROVER,
United States Attorney for the District of Columbia.
ATLEE POMERENE,
Special Counsel.

18 *Proof of Publication.*

Filed Sep. 16, 1929.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, Elmer F. Yount, a Notary Public in and for the District of Columbia, aforesaid, W. R. Little, who being duly sworn according to law, on oath says that he is the Agent and Auditor of The Evening Star, a daily newspaper published in the City of Washington, District of Columbia, and that the advertisement, of which the annexed is a true copy, was published in said newspaper six times on the following dates: January 8, 15, 22, 29, 1929; February 5, 12, 1929, at a cost of seventy-seven 40/100 (77.40) Dollars.

W. R. LITTLE.

Sworn and subscribed to before me Feb. 14, 1929.
[SEAL.] ELMER F. YOUNT,
Notary Public.

(See alias order to show cause of December 26, 1928.)

By virtue of the foregoing alias order issued out of the Supreme Court of the District of Columbia in the case of the United States vs. Harry M. Blackmer in Contempt No. 18, I have this 7th day of January, 1929, levied upon and

seized and taken into my custody securities to the value of $100,000, being the property of the said Harry M. Blackmer, and I hereby give notice to the said Harry M. Blackmer to be and appear before the Supreme Court of the District of Columbia on or before Fedruary 25, 1929, at 10 o'clock a. m., as admonished in said alias order; and I further give notice that the securities levied upon and seized by me will be held "until further ordered by the court for the purpose of satisfying any judgment that may be rendered against H. M. Blackmer in this proceeding". (Signed) Edgar C. Snyder, United States Marshal in and for the District of Columbia.

DISTRICT OF COLUMBIA:

In the Supreme Court of the District of Columbia.

Schedule of Levy Under

$100,000 U. S. First Liberty Loan 3½% bonds callable at the option of the United States on or after June 15, 1932, due June 15, 1947, with December 15, 1927, and subsequent coupons attached.

95 bonds at $1,000 each, numbered 5806, 5807, 5808, 5809, 22933, 41257, 41258, 41259, 41260 41261 41262, 41263 41264, 41265, 41266, 41282, 50976, 91659, 96417, 96418, 96420, 96421, 96422, 107930, 196887, 267999, 268153, 268154, 460999, 509626, 509627, 509628, 509629, 509630, 509631, 509632, 509633, 509634, 614071, 614072, 614073, 631401, 614074, 614075, 631402, 720213, 720214, 720215, 720216, 720217, 720218, 720219, 720220, 750021, 750022, 750023, 750024, 750025, 750026, 750027, 843080, 860308, 860309, 860310, 860312, 888351, 888352, 888353, 888354, 888355, 888356, 888357, 888358, 888359, 888699, 888700, 1005452, 1005453, 1005454, 1005455, 1005456, 1005457, 1005458, 1005459, 1019999, 1020000, 1020157, 1020158, 1020159, 1020160, 1020443, 1020444, 888702, 888703, 888704.

10 bonds at $500 each, numbered 211054, 211055, 182009, 214940, 265573, 278356, 278362, 282378, 282379, 282618,

We, the undersigned, citizens of the District of Columbia, having been duly summoned and sworn by the Marshal of said District, do hereby certify that we have appraised

the property described in the foregoing schedule at One Hundred Five Thousand Four Hundred Seventy one and 15/100 Dollars.

Given under our hands and seals, this seventh day of January, 1929.

F. A. LIVINGSTONE, [SEAL.]
Assistant Chief, Division of Securities, Treas. U. S.

A. W. TYLER, [SEAL.]
Chief Trust Section, Division Securities, Treas. U. S.

21 Marshal's Return.

I have this 7th day of January, 1929, executed the within order in the case of United States vs. Harry M. Blackmer by levying upon and seizing One Hundred Thousand ($100,000) Dollars in United States First Liberty Loan Bonds at the par value of $100,000, the property of the said defendant, Harry M. Blackmer.

EDGAR C. SNYDER,
U. S. Marshal in and for the District of Columbia.

Jan. 7, 1929.

Attached as per schedule.

E. C. SNYDER,
U. S. Marshal in and for Dist. of Columbia.

Return of Service.

Served a true copy of the within order on the within-named Harry M. Blackmer by delivering said true copy personally to him on the 21st day of January, 1929, at Paris, France.

GEORGE ORR,
Consul of the United State at Paris, France.

744.
No fee prescribed.

Motion to Vacate Order of December 26, 1928, & Proceedings, &c.

Filed Feb. 25, 1929.

* * * * * * *

And now come Nathan L. Miller and George Gordon Battle, attorneys for Harry M. Blackmer, appearing specially for the purposes of this motion only, and move this Honorable Court to vacate and set aside the order herein of this Honorable Court, dated December 26, 1928, and all proceedings pursuant thereto, on the ground that this Honorable Court has not jurisdiction of said Blackmer and has not jurisdiction of this proceeding, for the following reasons, among others, viz:

22 (1) That said order and all proceedings pursuant thereto and the provisions of the Act of Congress of July 3, 1926, C. 762 (44 Stat. 835), pursuant to which said order was made and said proceedings had, are void because in conflict with the following provisions of the Constitution of the United States, viz:

(*a*) The Fifth Amendment, providing that no person shall be deprived of life, liberty, or property without due process of law;

(*b*) The Fourth Amendment, providing that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizure, shall not be violated;

(*c*) The Eighth Amendment, providing that excessive fines shall not be imposed, nor unusual punishments inflicted;

(*d*) The Sixth Amendment, providing that in all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation;

(*e*) The Sixth Amendment, providing that in all criminal prosecutions the accused shall enjoy the right of trial by jury;

(*f*) The Sixth Amendment, providing that in all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor.

Wherefore the undersigned move this Honorable Court to issue an order vacating and setting aside said order,

dated December 26, 1928, and vacating and setting
23 aside any purported service thereof on said Blackmer by delivery of a copy thereof to him personally in France and/or by publication thereof in the Washington Evening Star pursuant to said order, and directing the immediate release of said Blackmer's property within the United States heretofore levied upon or seized by the Marshal, pursuant to said order, viz, One Hundred Thousand Dollars par value of First Liberty Loan Bonds;

And the undersigned further move this Honorable Court to extend the time for answer in this proceeding until twenty days after final determination of the foregoing motion.

This motion is made upon the proceedings heretofore had herein and upon the annexed affidavit of George Gordon Battle, verified February 23, 1929, and the affidavit of Harry M. Blackmer, verified January 2, 1928.

Dated February 23, 1929.

NATHAN L. MILLER,
GEO. GORDON BATTLE,
Attorneys for Harry M. Blackmer, Appearing Specially for the Purposes of This Motion Only.

Affidavit in Support of Motion to Vacate Order and Proceedings.

• • • • • • •

STATE OF NEW YORK,
County of New York, ss:

George Gordon Battle, being duly sworn, deposes and says:

I am one of the attorneys for Harry M. Blackmer in this proceeding, appearing specially for the purposes of
24 the above mentioned motion only. I have acted as attorney for Mr. Blackmer in various matters during a number of years last past, and I am familiar with his affairs.

A previous contempt proceeding was instituted against the said Harry M. Blackmer and an order to show cause

why he should not be punished therein was made by this Court and dated November 16, 1927. A motion to vacate and set aside the said order and all proceedings pursuant thereto on the ground that the Honorable Court had no jurisdiction of the said Blackmer and had no jurisdiction of the proceeding, for the reason that the order and all proceedings thereon are void, because in conflict with the Fifth, Fourth, Eighth and Sixth Amendments to the Constitution of the United States, was duly made in the said first contempt proceeding and was argued on March 3, 1928, which motion was thereafter denied. Upon the return of said motion to vacate the said first named contempt proceedings, Mr. Blackmer filed his affidavit, verified January 2, 1928, in the City of Paris, in the Republic of France, copy of which is attached to this affidavit, the original being on file with this Court. Reference is made to the original with the same force and effect as if it were filed herewith and the Court is asked to take the copy hereto attached in lieu of such original, such original being on file with this Court. In the affidavit of Mr. Blackmer, it is stated:

"In the year 1926 he formed the intention of residing permanently abroad and then disposed of his former home in the City of Denver, since which time he has at all times resided abroad, spending his time in England, in France and elsewhere. Since 1924 the affiant has had no regular place of business in the United States of America, and such business affairs as he had in America have been handled chiefly by his attorneys in the City of New York, State of New York."

25 I know of my own knowledge that the same condition still continues. I went abroad and saw Mr. Blackmer there. I know he has not been in this country since 1926. On information and belief, therefore, as well as from my personal knowledge, I state that since 1926 he has at all times resided abroad, spending his time in England, in France and elsewhere.

Furthermore, upon the return of the argument of the motion to vacate the order to show cause in the first contempt proceeding, it was said:

"The Court: From your point of view this question of

whether he has a permanent residence abroad is immaterial?

Mr. Pomerene: Entirely immaterial and entirely irrelevant in our judgment.

The Court: Governor Miller asked whether or not it will be considered a controverted fact as to his residence abroad.

Mr. Pomerene: We are going to hear this motion on the record as it is. We are not controverting that fact. We do not concede it at all, but we are not in a position to controvert it at the present moment.

The Court: You are ready to go on with the motion?

Mr. Pomerene: We are.

Mr. Miller: I am quite willing to go on on that assumption. We do not ask for a concession. I simply wish to know that the point is not controverted."

It appears, therefore, that the question of Mr. Blackmer's residence abroad is not controverted.

GEORGE GORDON BATTLE.

Sworn to before me this 23rd day of February, 1929.

[SEAL.] EDITH M. HARDY,
Notary Public, Westchester Co.

Certificate filed in New York County.
Clerk's No. 27, Register's No. 9011.
Kings Co. Clk. No. 1, Reg. No. 9012.
Commission expires March 30, 1929.

26 CITY OF PARIS,
Republic of France, ss:

On this 2nd day of January 1928 personally appeared before me Henry M. Blackmer, who, being duly sworn, deposes and says that he was born in the City of Worcester, State of Massachusetts, United States of America; that for a period of over ten years up to and including 1923, he was a resident of the City of Denver, State of Colorado, United States of America, having his home in that City, and was actively engaged in business there; that for some years prior to 1923 he was the President and later the Chairman of the Board of Directors of the Midwest Refining Company, a Colorado corporation engaged in the oil business;

that in the year 1924 he left the City of Denver, State of Colorado, United States of America, resigning his position as Chairman of the Board of Directors of the Midwest Refining Company, and retired from business, taking up his residence at Hotel Plaza Athenée, in the City of Paris, France (although retaining his American citizenship): that thereafter and in the year 1926 he formed the intention of residing permanently abroad and then disposed of his former home in the said City of Denver, since which time he has at all times resided abroad, spending his time in England, in France and elsewhere. Since 1924 the affiant has had no regular place of business in the United States of America, and such business affairs as he had in America have been handled chiefly by his attorneys in the City of New York, State of New York.

HENRY M. BLACKMER.

27 Sworn to and subscribed before me this 2nd day of January, 1928.

[SEAL.] BENJAMIN H. CONNOR,
A Commissioner for the State of New York.

Order Continuing Hearing.

Filed Feb. 25, 1929.

Come now the parties hereto, by their representative attorneys of record (the attorneys for the Respondent Harry M. Blackmer appearing specially for the purpose of the motion only) and now, this 25th day of February, A. D. 1929, before Mr. Justice Siddons, attorneys for the respondent move for a postponement of the hearing on the rule to show cause heretofore made returnable on February 25th, 1929, to a later date, and further having filed a motion to vacate the order of this court dated December 26th, 1928, and the said motion for postponement having been heard and considered, it is, for good cause shown,

Ordered that the hearing on said motion and the hearing on the rule to show cause be, and the same hereby are postponed to the 25th day of March, A. D. 1929, at 10 o'clock a. m.

F. L. SIDDONS,
Justice.

28 *Order Continuing Hearing.*

Filed Mar. 25, 1929.

* * * * * * *

Come now the parties hereto, by their respective attorneys of record (the attorneys for the Respondent Harry M. Blackmer appearing specially for the purpose of the motion only) and now, this 25th day of March, A. D. 1929, before Mr. Justice Stafford, attorneys for the respondent move for a postponement of the hearing on the rule to show cause heretofore made returnable on Feb. 25th, 1929, to a later date, and further having filed a motion to vacate the order of this court dated December 26th, 1928, and the said motion for postponement having been heard and considered, it is, for good cause shown,

Ordered that the hearing on said motion and the hearing on the rule to show cause be, and the same hereby are postponed to the 25th day of April, A. D. 1929, at 10 o'clock, a. m.

WENDELL P. STAFFORD,
Justice.

Order Continuing Hearing.

Filed Apr. 25, 1929.

* * * * * * *

Come now the parties hereto, by their respective attorney of record (the attorneys for the Respondent Harry M. Blackmer appearing specially for the purpose of the motion only) and now, this 25th day of April, A. D. 1929, before Mr. Justice Siddons, attorneys for the respondent move for a postponement of the hearing on the rule to show cause

29 heretofore made returnable on Feb. 25th, 1929, to a later date, and further having filed a motion to vacate the order of this court dated December 26th, 1928, and the said motion for postponement having been heard and considered, it is, for good cause shown,

Ordered that the hearing on said motion and the hearing on the rule to show cause be, and the same hereby are postponed to the 25th day of May, A.D. 1929, at 10 o'clock a. m.

F. L. SIDDONS,
Justice.

Decree.

Filed June 6, 1929.

* * * * * * *

This cause coming on to be heard on the motion of the defendant to vacate and set aside the order of this Court, dated December 26, 1928, and all proceedings pursuant thereto and having been submitted to the Court, it is by the Court this 6th day of June, 1929,

Adjudged, ordered and decreed that the said motion to vacate and set aside the order of this Court, dated December 26, 1928, and all proceedings pursuant thereto, be and the same is hereby, overruled; and the defendant, Harry M. Blackmer, is hereby given twenty (20) days in which to file his answer in the above entitled proceeding.

F. L. SIDDONS,
Justice.

30 *Plea.*

Filed Sept. 9, 1929.

* * * * * * *

Whereas heretofore Nathan L. Miller and George Gordon Battle, attorneys for the defendant, appearing specially for that purpose only moved this Honorable Court to vacate and set aside the Order to Show Couse herein dated December 26, 1928, and all proceedings pursuant thereto on the ground that this Honorable Court had not and has not jurisdiction of the defendant nor jurisdiction of this proceeding, for the reason and upon the gruonds mentioned in said motion, and in particular moved this Honorable Court to vacate and set aside the purported service herein of said Order to Show Cause on defendant while in Paris, France, pursuant to the terms of said order, and to direct the release of his property within the United State heretofore levied upon or seized or attempted to be levied upon or seized by the Marshal pursuant to said order; and

Whereas said motion was made upon the proceedings theretofore had herein and upon the affidavit of said George Gordon Battle thereto annexed, verified February 23, 1929, and the affidavit of defendant, verified January 2, 1928, and

Whereas the said motion duly came on to be heard and, by order dated June 6, 1929, this Honorable Court over-

ruled and denied the said motion and gave defendant twenty days in which to file his answer herein; and defendant and his attorneys believe this Honorable Court has not jurisdiction of defendant or of this proceeding, and that said motion should accordingly have been granted;

Now, therefore, defendant by his undersigned at-
31 torney, appears and answers herein under protest, pursuant to said order of June 6, 1929, reserving all his claims and rights in and under the said motion and the proceedings had thereon; and subject to such protest and reservation, for his plea to the charge contained in the Petition for Order to Show Cause heretofore filed on behalf of the United States, pursuant to which said Order to Show Cause of December 26, 1928, was issued, answers the allegations of said petition as follows:

1. Answering paragraph 1 of said Petition for Order to Show Cause, defendant:

(*a*) Admits that on or about the 9th day of January, 1928, E. A. Rover, (sic) United States Attorney for the District of Columbia, and Atlee Pomerene and Owen J. Roberts, Special Counsel for the United States of America, presented their petition to this Honorable Court for the issuance of subpœnas (hereinafter referred to as said Petition for Subpœnas) directed to defendant, who was and is a citizen of the United States, to appear before this Honorable Court on Monday, April 2, 1928, as a witness in the case of the United States vs. Harry F. Sinclair and Albert B. Fall, Criminal No. 43,324 on the docket of this Honorable Court, and that said Petition for Subpœnas now appears of record therein.

(*b*) Denies that said Petition for Subpœnas was presented to this Honorable Court in accordance with the Act of Congress of July 3, 1926, C. 762 (44 Stat. 835) (hereinafter referred to as "said Act of Congress") and denies that said Petition for Subpœnas was in accordance with said Act of Congress.

(*c*) Alleges that said Petition for Subpœnas
32 shows on its face that it was and is wholly invalid as a showing for the issuance of subpœnas directed to defendant in accordance with said Act of Congress, for the reason that all allegations therein contained pretending to constitute such showing are not based upon facts but upon mere unsupported, unverified beliefs of the petitioners.

(*d*) Alleges that said Petition for Subpœnas expressly admits that defendant is beyond the jurisdiction of the United States.

(*e*) Alleges that the presentation of and the action of this Honorable Court on said Petition for Subpoenas were entirely ex parte; that defendant was afforded neither due notice thereof nor due opportunity to be heard therein;

Alleges that defendant never received said Petition for Subpœnas, or a true copy or due notice thereof, pursuant to said Act of Congress, or to any order of this Honorable Court, or to any lawfully authorized action of any person whomsoever, in or in connection with the proceedings, of any of them, alleged or prayed for in said Petition for Order to Show Cause.

2. Answering paragraph 2 of said Petition for Order to Show Cause, defendant:

(*a*) Admits that on the 9th day of January 1928, this Honorable Court made an order based upon the said Petition for Subpœnas for the issuance of the subpœnas therein prayed for, and that on the 12th day of January, 1928, alleged subpœnas were issued directed to the Consuls of the United States and (sic) foreign countries for service upon defendant.

(*b*) Denies that subpœnas were duly issued;

33 Denies that said alleged subpœnas were duly issued in accordance with the terms of said Act of Congress and/or in accordance with the said order of this Honorable Court.

(*c*) Alleges that the alleged subpœnas referred to in paragraph 2 of said Petition for Order to Show Cause and therein alleged to have been issued on the 12th day of January, 1928, were in form as follows, to wit:

Supreme Court of the District of Columbia.

No. 43324, Criminal Docket.

THE UNITED STATES

vs.

HARRY F. SINCLAIR and ALBERT B. FALL.

The President of the United States to —— ——:

You are hereby commanded to attend the said court on Monday, April 2nd, 1928, at ten o'clock A. M., to testify

on behalf of the United States, and not depart the Court without leave of the Court or District Attorney.

Witness the Honorable Walter I. McCoy, Chief Justice of said Court, January 12, 1928.

[Seal of the Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk,

(Signed) By —— ——,
Assistant Clerk.

3. Answering paragraph 3 of said Petition for
34 Order to Show Cause, defendant:

(*a*) Admits the allegations therein contained.

4. Answering paragraph 4 of said Petition for Order to Show Cause, defendant:

(*a*) Admits that the amount to be tendered to each of the witnesses referred to in said order of this Honorable Court (based upon said Petition for Subpœnas) for his necessary expenses in traveling to and from Washington, D. C., and for his attendance at Court, was by said order fixed and determined at $500.00.

(*b*) Denies each and every other allegation therein contained.

5 Answering paragraph 5 of said Petition for Order to Show Cause, defendant:

(*a*) Admits that on the first day of February, 1928, George Orr, at Paris, France, exhibited and read to defendant an alleged subpœna in form and substance as set out in Exhibit "A" attached to said Petition for Order to Show Cause, and left with defendant, at Paris, France, a duplicate copy thereof; admits that said George Orr at the same time tendered to defendant the sum of Five Hundred Dollars ($500.00) in currency of the United States of America and that defendant refused to take the said moneys or any part thereof.

(*b*) As to the allegations that said George Orr was a Consul of the United States at Paris, France, defendant has no knowledge or information thereof sufficient to form a belief, and therefore denies the same.

(*c*) Denies that the matters and things done alleged in paragraph 5 of said Petition for Order to Show
35 Cause, or any of them, constitute due or lawful service of one of said alleged subpœnas upon defendant in Paris, France, on February 1, 1928, or at any other time, or that said alleged matters and things done, or any of them, had any legal force or effect.

Denies that said alleged subpœna ever had any legal force or effect at Paris, France, or elsewhere.

(*d*) Alleges that at the time of said alleged service of said alleged subpœna defendant refused to accept the same;

Alleges that in tendering said Five Hundred Dollars ($500.00) to defendant, said Orr did not inform defendant that the same was for his necessary expenses in traveling to and from the place at which this Honorable Court sits and/or for his expenses in attendance thereat.

(*e*) Alleges that said alleged subpœna was not issued or served under the authority of said Act of Congress, or pursuant to any order of this Honorable Court under said Act of Congress; alleges that said alleged subpœna contained no notice to defendant that it was issued under authority of said Act of Congress and/or pursuant to any order of this Honorable Court; that neither the original nor a true copy of said Petition for Subpœnas, or said Order for Subpœnas, was served as a part of or in connection with or to accompany said alleged service of said alleged subpœna; that no due or lawful notice of any kind was ever furnished defendant that said subpœna was issued and/or was served under authority of said Act of Congress and/or pursuant to any order of this Honorable Court.

36 6. Answering paragraph 6 of said Petition for Order to Show Cause, defendant:

(*a*) Admits that said George Orr made to the Clerk of this Honorable Court a pretended return of said alleged service of said alleged subpœna and of the alleged tender of said money, as appears of record in said cause (The United States vs. Harry F. Sinclair and Albert B. Fall, No. 43,324, Criminal Docket); admits that a true copy of said alleged subpœna and of said alleged return thereof are attached to said Petition for Order to Show Cause, marked Exhibit "A" therein, and are made a part of said Petition for Order to Show Cause.

(*b*) As to the allegation that "said consul" made said pretended return of said alleged service and of said alleged tender, defendant has no knowledge or information thereof sufficient to form a belief, and therefore denies the same.

(*c*) Denies that said pretended return of said alleged service and/or said alleged tender, was due or lawful or that the same had or has any legal force or effect.

(*d*) Alleges that said pretended return on its face shows that it was not due or lawful in that it shows that defendant did not receive due or lawful notice that said alleged subpœna and/or said alleged tender was pursuant to said Act of Congress; and that defendant did not receive due or lawful notice that said moneys tendered were for defendant's necessary expenses in traveling to and from the place at which the Honorable Court sits and for defendant's expenses in attendance thereat.

(*e*) Alleges that the affidavit of service required by paragraph 3 of Law Rule 19 of this Honorable Court was not made.

37 7. Answering paragraph 7 of said Petition for Order to Show Cause, defendant:

(*a*) Admits the allegations therein contained.

(*b*) Alleges that said case (The United States vs. Harry F. Sinclair and Albert B. Fall, Criminal Docket No. 43,-324) was not called for trial on April 2, 1928, and that defendant did not receive due or lawful notice that the trial of said case was continued to April 9, 1928; that there were no proceedings in said case on Monday, April 2nd, 1928, at ten o'clock a. m., or at any other time on that day; that defendant could not have testified in said case on April 2, 1928, on behalf of the United States, or otherwise, had he then appeared in response to said subpœna; that defendant was not called as a witness, or otherwise, in said case or by or on behalf of this Honorable Court, at any time on April 2nd, 1928.

8. Answering paragraph 8 of said Petition for Order to Show Cause, defendant:

(*a*) Admits that the trial of said criminal case No. 43,-324 was commenced in this Honorable Court at ten o'clock a. m. on Monday, April 9, 1928; that said Atlee Pomerene and Owen J. Roberts, Special Counsel for the United States of America, requested this Honorable Court to have the

Clerk call defendant; that this Honorable Court instructed the Clerk to call and the Clerk did call "H. M. Blackmer"; that defendant did not respond to said call and did not appear.

(*b*) Denies that defendant was called "as a witness";

38 Denies that defendant neglected and refused to appear.

(*c*) Alleges that defendant was not commanded by said alleged subpœna to attend the trial of said case on Monday, April 9, 1928, but was commanded to attend said trial on April 2, 1928; that no trial of said case was had on April 2, 1928; that defendant was not lawfully bound to attend the trial of said case on April 2, 1928, on April 9, 1928, or at any other time.

9. Denies each and every allegation in said Petition for Order to Show Cause not hereinafter expressly admitted or denied.

And for a first further plea—

Defendant re-alleges the allegations contained hereinbefore as if here repeated at length; and

Alleges that said Order for Subpœnas and the alleged issuance and alleged service of an alleged subpœna and/or subpœnas pursuant thereto, referred to in paragraphs "2," "3," and "5" of the said petition, and the pretended return of such alleged service, referred to in paragraph "6" of the said petition, and the provisions of the Act of Congress of July 3, 1926, C. 762 (44 Stat. 835) pursuant to which said proceedings were alleged to have been taken, were and are null, void and of no force and effect because they are in conflict with the Constitution of the United States, especially the provision of the Fourth Amendment, providing that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures, shall not be violated; the Eighth Amendment,

39 providing that excessive fines shall not be imposed, nor unusual punishments inflicted; the Sixth Amendment, providing that in all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation; the Sixth Amendment, providing that in all criminal prosecutions the accused shall enjoy the right of trial by jury; the Sixth Amendment, providing

that in all criminal prosecutions, the accused shall enjoy the right to have compulsory process of obtaining witnesses in his favor, and of the Fifth Amendment, that no person shall be deprived of life, liberty or property without due process of law.

And for a second further plea—

Defendant re-alleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that said Petition for Order to Show Cause was not verified as required by Law Rule 17 and Equity Rule No. 8 of this Honorable Court.

And for a third further plea—

Defendant re-alleges the allegations contained hereinbefore as if here repeated at length. and

Alleges that the said Order to Show Cause herein is too vague and indefinite to be readily understood and to acquaint defendant with the facts constituting the alleged contempt therein referred to, in the following particulars, to wit:

The subpœna which it is alleged therein defendant neglected, failed and refused to obey, is not sepcified or described except that it is alleged that such subpœna was "heretofore issued" by this Honorable Court and was served upon defendant to appear before this Honorable Court as a witness in the case of The United States vs. Harry F. Sinclair and Albert B. Fall, Criminal No. 43,324, on the docket of this Honorable Court, the circumstances of which are alleged in said Order to Show Cause to be very fully set out in a certain motion of plaintiff alleged in said order to be filed herein.

Alleges that three pretended subpœnas having relation to said case have come to the attention of defendant—one such subpœna alleged to have been served on defendant by George Orr, at Paris, France, on May 27, 1927; one such subpœna alleged to have been served on defendant by Raymond Davis at Paris, France, on June 7, 1927.—all as appears in the records of this Honorable Court in The United States vs. Harry M. Blackmer, Contempt No. 16,—and one such subpœna alleged to have been served on defendant by said Orr on February 1, 1928, as appears in the said Petition for Order to Show Cause.

Alleges that neither the "motion of plaintiff" referred to in said Order to Show Cause, or a true copy thereof, ac-

companied said Order to Show Cause, or was ever duly or lawfully received in any manner by defendant; and that it is impossible to tell from said Order which "motion of plaintiff" is referred to,—whether the motion for Order to Show Cause appearing in the records of this Honorable Court in The United States of America vs. Harry M. Blackmer, Contempt No. 16, or whether the said Petition for Order to Show Cause in The United States of America vs. Harry M. Blackmer, Contempt No. 18, or whether
41 some other motion or petition.

And for a fourth further plea—

Defendant re-alleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that there is nothing in said Order to Show Cause to put the defendant upon due or lawful notice that said Order was issued in accordance with said Act of July 3, 1926, C. 782 (44 Stat. 835); that defendant has never been duly or lawfully informed of the facts constituting his alleged offense herein.

And for a fifth further plea—

Defendant re-alleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that there are no grounds shown in said Order to Show Cause or in said Petition for Order to Show Cause why the Marshal of the District of Columbia should be ordered to levy upon and seize the property of defendant within the United States of the amount and value of One Hundred Thousand Dollars ($100,000), or so much thereof as may be found, and to hold the same until further order by this Honorable Court for the purpose of satisfying any judgment that may be rendered against defendant in this proceeding.

And for a sixth further plea—

Defendant re-alleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that Order to Show Cause was not accompanied with a copy of said Petition for Order to Show Cause, or an affidavit, or of any notice thereto subscribed; that defendant was not served with said copy; that the pur-
42 ported return of said Order to Show Cause does not show the fact;—all contrary to the provisions of paragraph 1 of Law Rule 19 of this Honorable Court.

And for a seventh further plea—

Defendant re-alleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that said Order to Show Cause was not published in the Washington Law Reporter, as required by paragraph 4 of Law Rule 19, of this Honorable Court.

And for an eighth further plea—

Defendant re-alleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that the United States Marshal did not make the seizure or levy of defendant's property ordered in said Order to Show Cause, or as contemplated or authorized by said Act of Congress, or any lawful seizure of or levy upon the property of this defendant; that the pretended levy and seizure of the United States Marshal in and for the District of Columbia made on or in connection with said Order to Show Cause and his pretended return thereon appearing in the records of this Honorable Court were upon property all of which had previously been seized and levied upon by said Marshal and which was then being held by him under the orders of this Honorable Court in the United States of America vs. Harry M. Blackmer, Contempt No. 16, for the purpose of satisfying any judgment that may be rendered against defendant in said last-mentioned action; that said property was not subject to seizure in this Contempt No. 18.

43 And for a ninth further plea—

Defendant re-alleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that no affidavit in connection with the attachment of defendant's property ordered by said Order to Show Cause was made to comply in statement with the provisions and requirements of Sec. 445 of the Code, as amended by the Act of Congress approved April 19, 1920,—contrary to the provisions of paragraph 1 of Law Rule 9 of this Honorable Court.

And for a tenth further plea—

Defendant re-alleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that the testimony expected from defendant as alleged in said Petition for Order to Show Cause in United States of America vs. Harry F. Sinclair and Albert B. Fall,

Criminal Docket No. 43,324, if admissible at all, would have been circumstantial in character and only of inferential, if of any, value; that the direct testimony introduced in said case by the United States through its witness, one M. T. Everhart, covering, among other matters, the same ground expected to be covered by defendant as alleged in the said Petition to Show Cause, would have rendered the expected testimony of defendant inadmissible; that said witness Everhart, and his testimony were available to the United States on the date of said Petition for Subpœnas and at all times subsequent to December 31, 1927; and defendant was so advised and such advice was a factor in his decision not to respond to the said subpœna alleged to have been served upon him.

44 And for an eleventh further plea—

Defendant re-alleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that after the alleged service of the pretended subpœna referred to in paragraph 5 of said Petition for Order to Show Cause, defendant, desiring to perform his legal obligations (if any), obtained opinions in that regard from several attorneys at law of high repute in the United States; that he was advised by each and all of said attorneys after full consideration, that he was not under any such obligation, but that on the contrary, said alleged service and the proceedings purporting to authorize the same, and the provisions of said Act of Congress, were unconstitutional and wholly void and of no force or effect for the reasons hereinbefore mentioned, and relying on such advices defendant did not appear according to the purported demand of said pretended subpœna so allegedly served.

And for a twelfth further plea—

Defendant re-alleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that this action (Contempt No. 18) and United States vs. Harry M. Blackmer, Contempt No. 16, pending before this Honorable Court relate to the alleged refusal of defendant to respond to alleged subpœnas all of identical form except as to the dates of the trial therein referred to; that each of said subpœnas was allegedly requested and issued to elicit from defendant exactly similar testimony as will more fully appear from the petitions for orders to

show cause in said two actions; that all of said al-
45 leged subpœnas purported to command defendant to attend the trial of The United States vs. Harry F. Sinclair and Albert B. Fall, No. 43,324, Criminal Docket; that the first uncompleted trial of said case No. 43,324 Criminal Docket and the completed second trial thereof were on the same indictment; that the contempt alleged in said Contempt No. 16 and that alleged in said Contempt No. 18, are alleged to be contempts of the same court; that at the time of the commencement of proceedings in this Contempt No. 18,—Contempt No. 16 was pending (and is now pending) before this Honorable Court, and attorneys for defendant, appearing specially for the purpose, had filed pleadings and had made showing therein in defense of what is in substance the same charge as that alleged in this Contempt No. 18; that this proceeding is an attempt to inflict double punishment upon defendant for what is in fact and substance but one offense, if any.

Wherefore defendant prays judgment that he is not guilty of contempt of Court, as charged in said Petition for Order to Show Cause, and directing the release of his property within the United States, heretofore seized or claimed to have been seized by the Marshal purporting to act pursuant to said Order to Show Cause, to wit: $100,000 par value of First Liberty Loan Bonds and that this proceeding be dismissed.

GEO. GORDON BATTLE,
Attorney for Defendant,
Appearing as Hereinbefore Stated.

Dated September 7, 1929.

46 *Demurrer.*

Filed Sep. 12, 1929.

* * * * * * *

And now comes the United States, by its attorneys, Leo Rover, United States Attorney for the District of Columbia, and Atlee Pomerene and Owen J. Roberts, Special Counsel for the United States of America, and demurs to sub-paragraph *e* of the 6th paragraph of the defendant's First Plea, and also demurs to the defendant's First Fur-

ther Plea, Second Further Plea, Sixth Further Plea, Seventh Further Plea, Eighth Further Plea and Ninth Further Plea, and says that the said Pleas are bad in substance.

LEO A. ROVER,
United States Attorney.

ATLEE POMERENE,
OWEN J. ROBERTS,
Special Counsel.

NOTE.—Among the matters of law intended to be argued in support of the foregoing Demurrer are the following:

1. The provisions of paragraph 3 of Law Rule 19, the provisions of Law Rule 17 and Equity Rule 8, the provisions of paragraph 1 of Law Rule 19, and the provisions of paragraph 4 of Law Rule 19, all of the Supreme Court of the District of Columbia, are inapplicable to the present contempt proceeding.

2. The Act of July 3, 1926, C. 762 (44 Stat. 835) does not violate in any manner the provisions of the Fourth, Fifth, Sixth and Eighth Amendments to the Constitution of the United States or any other provisions thereof.

3. The Act of July 3, 1926, C. 762 (44 Stat. 835), is constitutional and binding upon the defendant.

47 4. The levy and seizure by the United States Marshal of defendant's property under the order of this Honorable Court, which property was then being held by him under a levy and seizure pursuant to the order of this Honorable Court in the United States of America vs. Harry M. Blackmer, Contempt No. 16, was lawful and valid, subject only to the said prior levy and seizure and the lien thereof.

5. The provisions of paragraph 1 of Law Rule 9 of the Supreme Court of the District of Columbia are inapplicable to the present contempt proceeding.

6. The aforesaid Pleas of the defendant are bad for other reasons on their face.

Replication.

Filed Sep. 12, 1929.

* * * * * * *

And now comes the United States, by its Attorneys, Leo Rover, United States Attorney for the District of Columbia, and Atlee Pomerene and Owen J. Roberts, Special Counsel for the United States of America, and for its replication to the allegations of fact contained in sub-paragraph *b* of paragraph 7 and sub-paragraph *c* of paragraph 8 of defendant's First Plea avers as follows:

That the defendant was subpœnaed to appear on Monday, April 2, 1928 at 10 o'clock a. m., to testify on behalf of the United States, and under said subpœna was commanded not to depart the Court without leave of the Court or District Attorney; that the trial of criminal case No. 43,324 was continued by order of this Honorable Court
48 from Monday, April 2, 1928; to Monday, April 9, 1928, that said continuance was ordered in open court and witnesses subpœnaed to appear on Monday, April 2, were commanded by the Court to appear on Monday, April 9, 1928; that had the defendant not neglected, failed and refused to obey the subpœna duly served upon him, and had the defendant appeared in court on April 2, 1928 in obedience to the said subpœna, he would have been duly advised of the continuance and the order of the Court that witnesses subpœnaed to appear on April 2 should appear on April 9, 1928; that the said alleged failure of the defendant to receive due or lawful notice of the continuance is due entirely to the failure, neglect and refusal of the defendant to obey the subpœna duly served upon him; and that the defendant, having been duly subpœnaed to appear as a witness on April 2, 1928 and having thereby been commanded not to depart the Court without the leave of the Court or District Attorney was lawfully bound to attend the trial of said criminal case on April 2, 1928 and any postponed date thereof unless and until excused or discharged by the Court or District Attorney, and that the defendant was never so excused or discharged by Court or District At-

torney on April 2, or April 9, 1928, or at any other time or date.

LEO A. ROVER,
United States Attorney.
ATLEE POMERENE,
OWEN J. ROBERTS,
Special Counsel.

49 *Joinder of Issue.*

Filed Sep. 12, 1929.

* * * * * * *

And now comes the United States, by its attorneys, Leo Rover, United States Attorney for the District of Columbia, and Atlee Pomerene and Owen J. Roberts, Special Counsel for the United States of America, and joins issue with the defendant upon the allegations of fact contained in paragraphs 1, 2, 4, 5, sub-paragraphs *a*, *b*, *c* and *d* of 6, and sub-paragraph *b* of 8, of the defendant's First Plea; and also joins issue with the defendant upon the allegations of fact contained in the defendant's Third Further Plea, Fourth Further Plea, Fifth Further Plea, Tenth Further Plea, Eleventh Further Plea and Twelfth Further Plea.

LEO A. ROVER,
United States Attorney.
ATLEE POMERENE,
R.
OWEN J. ROBERTS,
Special Counsel.

Memorandum.

September 16-17.—Hearing of cause. Argument and Trial.

Motion of Defendant on Pleadings for Judgment.

Filed Dec. 30, 1929, (as of) Sep. 16, 1929.

* * * * * * *

The defendant herein, by his attorneys appearing especially for that purpose only, having moved this Court
50 to vacate and set aside the Order to Show Cause herein, dated December 26, 1928, and all proceedings

pursuant thereto on the ground that this Court had not and has not jurisdiction of the defendant or jurisdiction of this proceeding for the reason and upon the grounds mentioned in said motion and by order dated June 6, 1929, this Court having overruled and denied the said motion and giving the defendant leave to file his answer herein, and the defendant having filed his plea under protest pursuant to said order of June 6, 1929, reserving all his claims and rights in and under the said motion and the proceedings had thereon, and the United States Attorney for the District of Columbia and Special Counsel for the United States of America having filed on behalf of the United States a Joinder of Issue and a Demurrer, as appears by the record herein,

"Now, therefore, the said defendant, reserving all his claims and rights under the said motion and the proceedings had thereon and subject to such protest and reservation, moves by his undersigned attorney upon all the pleadings and proceedings herein for judgment that he is not guilty of contempt of court as charged herein and directing the release of his property within the United States heretofore seized or claimed to have been seized by the United States Marshal, and that this proceeding be dismissed upon the following grounds which appear upon the face of the pleadings, proceedings and record herein:

"1. That the petition of January 9, 1928, herein for the issuance of the subpœnas therein described, hereinafter called said Petition for Subpœna, shows on its face that it was and is wholly invalid, as any proper or other showing for the issuance of subpœnas directed to the defendant in accordance with the Act of Congress of July 3, 1926,
51 C. 762 (44 Stat. 835), hereinafter referred to as said Act of Congress, for the reason that all allegations therein contained pretending to constitute such showing, are not based upon facts but upon mere unsupported, unverified beliefs of the petitioners; and the said petition for Subpœnas expressly admits that the defendant is beyond the jurisdiction of the United States and the presentation of and the action of this Court on said Petition for Subpœnas were entirely ex parte; and that the defendant was afforded neither due or any other notice thereon nor due or any other opportunity to be heard therein; and the de-

fendant never received said petition for Subpœnas or any copy thereof or any due or other notice thereon pursuant to said Act of Congress or to any order of this Court or to any lawfully authorized action of any party whomsoever in or in connection with these proceedings or any of them.

"2. The alleged subpœnas directed to the defendant as described in the said Petition for Subpœnas and each of them had nothing on the face thereof to indicate that such subpœnas or either of them were issued or served in any way pursuant to or under the authority of the said Act of Congress, but on the contrary each of the said subpœnas was in the identical form used in this and all other United States Courts before the passage of said Act of Congress and also since the passage of said Act in the usual and ordinary cases in said Court in which the said Act of Congress is not invoked, and therefore the said defendant was not in any way notified by anything that appeared on the face of said subpœna that it was issued under or pursuant to the authority of the said Act of Congress, but on the contrary he was justified in believing on the face of the
52 said subpœna and from all the effects and proceedings connected therewith that the said subpœna was the usual subpœna issued in cases in this and all other United States Courts in which the said Act of Congress is not invoked or concerned; and that by reason of the foregoing the defendant was under no obligation to comply with the direction contained in the said alleged subpœnas.

"3. The alleged service of the said subpœna upon the defendant was wholly illegal, null, void and of no effect, because at the time of such alleged service of said subpœna the proper legal tender was not made to the defendant for his necessary traveling expenses and for his attendance at Court as required by the said Act of Congress, and that the said George Orr, in attempting and pretending to make the alleged tender of $500.00 did not inform the defendant that the same or any part thereof was for his necessary expenses in traveling to and from the place at which this Honorable Court sits and/or for his expenses in attendance thereat.

"4. The said alleged subpœna was not issued or served under the authority of said Act of Congress or pursuant to any order of this Court under said Act of Con-

gress; and said alleged subpœna contained no notice to defendant that the same was issued under authority of the said Act of Congress and/or pursuant to any order of this Court; that neither the original or any copy of said Petition for Subpœnas nor said order for subpœnas was served as a part of or in connection with or to accompany said alleged service of said alleged subpœna; that no due or lawful notice of any kind was ever furnished defendant that said subpœna was issued and/or was served under authority of said Act of Congress or pursuant to
53 any order of this Court.

"5. The said pretended return on its face shows that the said alleged service of said subpœna and/or the said alleged tender was not due or lawful or had any legal force or effect in that the said return shows that the defendant did not receive due or lawful notice that said alleged subpœna and/or said alleged tender was pursuant to said Act of Congress and the defendant did not receive due or lawful notice that said moneys alleged to have been tendered by said Orr were for defendant's necessary expenses in traveling to and from the place at which this Honorable Court sits and for defendant's expenses in attendance thereat:

"6. The affidavit of service required by Paragraph 3 of Law Rule 19 of this Court was not made.

"7. The said case (United States v. Harry F. Sinclair and Albert B. Fall, Criminal Docket #43324) was not called for trial on April 2, 1928 and the defendant did not receive due or lawful notice that the trial of said case was continued to April 9, 1928; there were no proceedings in said case on Monday, April 2, 1928 at 10 o'clock a. m. or at any other time on that day; the defendant could not have testified in said case of April 2, 1928 on behalf of the United States or otherwise had he then appeared in response to said subpœna. The defendant was not called as a witness or otherwise in said case or by or on behalf of this Honorable Court at any time on April 2, 1928; that defendant was not commanded by said alleged subpœna to attend the trial of said case on Monday, April 9, 1928, but was commanded to attend said trial on April 2, 1928; that no trial of said case was had on April 2, 1928; that defendant was not lawfully bound to attend the trial of said cause

on April 2, 1928, on April 9, 1928, or at any other
54 time.

"8. The said order for Subpœnas and the alleged issuance and alleged service of the alleged subpœna pursuant thereto and the said pretended return and the provisions of the said Act of Congress pursuant to which said proceedings were alleged to have been taken and each and all of the proceedings were and are null, void and of no force and effect because they are in conflict with the Constitution of the United States, especially the provisions of the Fourth Amendment providing that the right of the people be secure in their persons, houses, papers and effects against unreasonable seizures, shall not be violated; the Eighth Amendment providing that excessive fines shall not be imposed, nor unusual punishments inflicted; the Sixth Amendment providing that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusations; the Sixth Amendment providing that in all criminal prosecutions the accused shall enjoy the right of trial by jury; the Sixth Amendment providing that in all criminal prosecutions the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor; and the Fifth Amendment providing that no person shall be deprived of life, liberty or property without due process of law.

"9. The Petition for the Order to Show Cause herein was not verified as required by Law Rule 17 and Equity Rule 8 of this Court and also the said Petition was insufficient to justify the issuance of the Order to Show Cause.

"10. The said Order to Show Cause was and is too vague and indefinite to be readily understood and/or to acquaint
the defendant with the facts constituting the alleged
55 contempt therein referred to in the following particulars; to wit, the subpœna which it was alleged therein defendant neglected, failed and refused to obey is not specified or described except that it is alleged that such subpœna was 'heretofore issued' by this Honorable Court and was served upon defendant to appear before this Honorable Court as witness in the case of the United States v. Harry F. Sinclair and Albert B. Fall, Criminal #43324 on the Docket of this Honorable Court, the circumstance of which are alleged in said Order to Show Cause to be very

fully set out in a certain motion of plaintiff alleged in said order to be filed herein; four pretended subpœnas having relation to said case have come to the attention of defendant—one such subpœna alleged to have been served on defendant by George Orr at Paris, France, on May 27, 1927; —one such subpœna alleged to have been served on defendant by Raymond Davis at Paris, France, on June 7, 1927;—one alleged subpœna having been received by defendant commanding his appearance at this Court on the sixteenth day of January, 1928; and one subpœna alleged to have been served on defendant by said Orr on February 1, 1928; neither the 'motion of plaintiff' referred to in said Order to Show Cause or any copy thereof accompanied said Order to Show Cause or was ever duly or lawfully received in any manner by defendant; and it is impossible to tell from said order which 'motion of plaintiff' is referred to—whether the motion for Order to Show Cause appearing in the records of this Honorable Court in the United States of America v. Harry M. Blackmer, Contempt No. 16, or whether the Petition for Order to Show Cause in the United States of America v. Harry M. Blackmer, Contempt No. 18, or whether some other motion of plaintiff.

"11. Neither the said petition considered by this
56 Court as aforesaid, whatever it may have been, for the Order to Show Cause, nor any copy thereof, nor any other petition of Counsel above named for the United States or any of them accompanied said Order to Show Cause or was ever duly or lawfully received in any manner by the defendant.

"12. There is nothing in said Order to Show Cause to put the defendant upon due or lawful notice that the said Order to Show Cause was issued in accordance with said Act of Congress, and the defendant has never been duly or lawfully informed of the facts constituting his alleged offense herein.

"13. There are no grounds shown in said Order to Show Cause or in said petition for Order to Show Cause why the Marshal of the District of Columbia should be ordered to levy upon or seize, or why the said Marshal did make an alleged levy upon and seizure of the property of the defendant within the United States of the amount and value of $100,000.00 and/or to hold the same for the purpose of

satisfying any judgment that may be rendered against defendant in this proceeding.

"14. The said Order to Show Cause was not accompanied with a copy of said petition for Order to Show Cause or an affidavit or any notice thereto subscribed; the defendant was not served with any such copy; that the purported return of said Order to Show Cause does not show the fact—all contrary to the provisions of Paragraph 1 of Law Rule 19 of this Court.

"15. The said Order to Show Cause was not published in the Washington Law Reporter as required by Paragraph 4 of Law Rule 19 of this Court.

"16. The United States Marshal did not make the
57 seizure of levy of defendant's property ordered in said Order to Show Cause or as contemplated or authorized by said Act of Congress or any lawful seizure of or levy upon the property of this defendant; the pretended levy and seizure of the United States Marshal in and for the District of Columbia made on or in connection with said Order to Show Cause and his pretended return thereon appeared in the records of this Honorable Court were upon the property all of which had previously been seized and levied upon by said Marshal and which was then being held by him under the orders of this Honorable Court in the United States of America against Harry M. Blackmer, Contempt No. 16, for the purpose of satisfying any judgment that may be rendered against defendant in said last-mentioned action; the said property was not subject to seizure in this Contempt No. 18.

"17. No affidavit in connection with the attachment of the defendant's property ordered by said Order to Show Cause was made to comply in statement with the provisions and requirements of Section 445 of the Code, as amended by the Act of Congress approved April 19, 1920—contrary to the provisions of Paragraph 1 of Law Rule 9 of this Honorable Court.

"Wherefore and upon the foregoing grounds, the defendant moves on the pleadings and proceedings herein for judgment that he is not guilty of contempt of Court as charged in said petition for Order to Show Cause and directing the release of his property within the United States heretofore

seized or claimed to have been seized by the United States Marshal and that this proceeding be dismissed.

Dated September 16, 1929.

GEORGE GORDON BATTLE,
Attorney for Defendant,
Appearing as Hereinbefore Stated.

Opinion of Siddons, J.

58 Filed December 30, 1929.

* * * * * * *

The Court: So far as that rule is concerned, of course, it is controlled by the acts of the legislature. We have more than one example where Congress has prescribed what publication shall take place, and we are not following out our rule. Of course, our rules can be displaced at any time by an act of Congress. They have been more than once. Our standing rules do remain the law, provided they are within the competency of this Court, under the general powers conferred upon it by the Congress to make rules. And if our rules, promulgated in pursuance of the authority thus given, are within the scope of the authority conferred by the legislature, they are as much the law to be applied in the court as any statute. When Congress says, for instance, that publications in this classification shall be thus and so, then our rule gives place to the legislative command.

In this case the Walsh act prescribes publication in a newspaper, not in the Washington Law Reporter. Congress had a right to do that, and displace our rule in that regard. I do not think this court would be justified in saying, in view of this detailed language of the statute, "Well, we are going to require some further and additional publication. We are going to require publication in the Paris edition of the New York Herald, or the Paris edition of the New York Times. We will require publication in a paper somewhere else—the original home of the respondent here—and we will require it in the Washington Law Reporter." Congress says that publication in some newspaper is enough, and that was done. So, I do not think there is any merit
59 in that contention.

Very briefly going over the matter, of course, a trial court ought to approach a charge of unconstitution-

ality of an act of Congress with very great caution and care. We are all familiar with certain canons—shall I call them?—that have been laid down with respect to questions involving the constitutionality of an act of the legislature. There are not wanting those who have said—not courts, but textbook writers—that inferior courts, at least, ought never to undertake to declare an act of the legislature unconstitutional, but should pass it on to the reviewing authority. When I say "inferior courts" I am not referring to an inferior court of general jurisdiction, such as this is. Of course, we are inferior to the Court of Appeals, and we are inferior to the Supreme Court of the United States. We are a court of general jurisdiction, and that jurisdiction includes all the normal powers of a state court of original jurisdiction plus all the powers of a Federal circuit court, and the old Federal circuit in its original form, when it was simply a trial court. We have, in addition, a jurisdiction possessed by no other court in the country that I know of, and we exercise it, for no other reason, I suppose, than that we are here in the Nation's Capital, and can review certain appropriate cases of executive action and indirectly, at least, we can stay the hand of the President. I do not mean to say by direct process against the President, although that question, on civil process, has never been finally determined. As to the heads of departments exercising for the President the executive authority he sees fit to confer upon them, plus certain specific authorities that some of the heads of departments exercise by
60 reason of special acts of Congress, this court can hand down an injunction, a writ of prohibition, or the like, and either prevent or coerce appropriate action by heads of departments who, after all, are acting for the Executive, the President of the United States.

This court never hesitates, in a proper case, to declare an act unconstitutional, but it should proceed to the consideration of such contention as to unconstitutionality with great care and caution. If in doubt about the matter this court, I think, ought to sustain the constitutionality of the act and let the reviewing authority determine upon the accuracy or inaccuracy of the court's decision in that regard.

We have before us in this case an unusual piece of legis-

lation, unusual in the sense that, so far as we know, it has no analogous precedent in our legislative history; but that would not make it unconstitutional. It would be a sorry day for us, I think, when new conditions, new problems that occur out of our ever-changing and ever more complicated social order do not require new exercise of powers that we ought to consider, if we can, are within the constitutional competency of that branch of the government that may be undertaking to act in a given case.

Now, in this case, I am obliged to say to counsel for the respondent here that I most certainly consider that among the objections originally made to the constitutionality of this act by him was the claim, or the contention, that in terms, apparently, this Walsh act did not confer the same rights upon a defendant in a criminal case as it gives to the prosecution. I distinctly remember the able brief that was filed in behalf of the respondent in that regard, and
61 the equally able reply on that point of the contention.

I think that so far as the constitutionality of this act is concerned, this court remains in the same position as it was before. Counsel for the respondent should look for any correction of that judgment, of course, if it is wrong, to the reviewing court.

As to these other matters, our subpœna, if you will read it carefully, is, in a sense, a command of the President of the United States. It is a command of the President of the United States to the person named as a witness, and it is attested by the Chief Justice of this court. That is the form in which the subpœna is issued, and, so far as I know, it has always been in that same form in criminal cases. All our subpœnas, in detail, run in that way, as I recall it Is not that so, Mr. District Attorney?

Mr. Rover: Yes, your Honor.

The Court: I have here a copy of the subpœna issued in this case.

Mr. Roberts: It is Exhibit A of the petition.

The Court: It is just as I recall:

"The President of the United States to H. M. Blackmer, Paris, France:

"You are hereby commanded to attend the said court," and so forth.

The President of the United States is commanding this respondent to attend this court in a case the title of which is set forth, the United States on the one hand, and two defendants on the other. The case is identified by the number of the criminal docket, and the case is identified as effectually as I think it could be identified. The President of the
62 United States commands Blackmer to attend this court on Monday, April 2, 1928, at ten o'clock a. m., to testify on behalf of the United States "and not depart the Court without leave of the Court or District Attorney.

"Witness, The Honorable Walter I. McCoy, Chief Justice of said Court, January 12, 1928."

The seal of the court is attached, and the clerk, or his deputy, signed it.

Now, then, what intelligent person reading that subpœna could possibly doubt what was expected of him. It was to attend as a witness on behalf of the United States, in a case against the parties named in the title of the suit in the subpœna, to testify on behalf of the United States in this court. He is commanded by the President of the United States to be here on the second day of April, 1928. A copy of that subpœna was served upon him. The consul's return reads:

"George Orr, summoned personally all, the first day of February, 1928.

"H. M. Blackmer, by exhibiting said subpœna personally to the said H. M. Blackmer, reading the same to him and leaving a duplicate copy with him at Paris, France.

"I further certify that pursuant to the order of the court I did at the time of said service tender to the said H. M. Blackmer the sum of five hundred dollars currency of the United States of America, which tender the said H. M. Blackmer then and there refused."

That was the amount declared by this court, acting under specific provisions of the Walsh Act, to be the amount that was regarded as a reasonable one to meet his expenses in coming to the court. Does it require the consular
63 officer to specifically state in his return that the $500 was for that purpose, or was ordered by the court

prior to the issue of the subpœna? To do so would unnecessarily encumber the records of this court with matter that really does not go to the safeguarding of a written summons under these circumsstances at all.

I think I can appropriately say that he could not have supposed that it was a Christmas gift by the President of the United States to him. Probably he had a right to refuse to come unless his mileage was provided, and perhaps his witness fees as well, for the time he would be expected to be in attendance upon this court. I should hesitate very much to hold a person in contempt who, having a subpœna served upon him, said to the officer, "Where are my witness fees? Where is my mileage? Have I got to go from Paris, France, to Washington, D. C. at my own expense?"

It is not suggested that he made any such demand. In the absence of such a demand, the service is perfectly clear. Then contempt proceedings may be predicated on violation of the command of the subpœna, even though the witness fees and mileage were not tendered. There is no suggestion that the witness, in pursuance of his rights, said "Where are my expenses? Where is my mileage, if you are going to drag me from Paris to Washington." He did not do it. There is no suggestion of it. So, I do not think that ground has merit for attack.

Now, as to the notice that this man received of what was going on here, first, he had the command to be here on April 2. It does not make any difference whether he had several other commands to appear on that day. He had this
64 command and he did not obey, according to the record. He did not come in obedience to that command to be here on April 2. What happened on April 2 in the way of continuing the hearing until a later date was none of his concern. He was required to be here on that day, and not to depart until this court or the district attorney gave him permission. He did not come.

Upon his refusal, the fact is made known to this court and an application is made to this court for a rule to show cause.

It is plain here that the application, which took the form of a petition to this court, was not sworn to by counsel. That is not requisite so far as this witness is concerned, so long as he had notice of why he was commanded to be here.

The rule to show cause sets forth:

"Upon the motion of the United States of America, the defendant, H. M. Blackmer, is cited and admonished to appear before this court on the 25th day of February, 1929, at 10 o'clock a. m. and show cause, if any he has, why he the said H. M. Blackmer should not be adjudged guilty of contempt of court in neglecting, failing and refusing to obey the subpœna heretofore issued by said court and served upon him to appear before this Court as a witness in the case of the United States vs. Harry F. Sinclair and Albert B. Fall, Criminal No. 43,324 on the docket of this Court, the circumstances of which are very fully set out in said motion of plaintiff filed herein and why the said H. M. Blackmer should not be fined and punished therefor according to law."

It is plain that that order does not make specific reference to the facts specifically that required his appearance on April 2. To say that he could have any doubt as to what this order to show cause meant would be to say that he has not the intelligence of a low-grade moron. I do not ascribe anything of the kind to Mr. Blackmer.

Then there is the command to the marshal to levy and seize upon the property of the said H. M. Blackmer "of the amount and value of One Hundred Thousand Dollars ($100,000.00) or so much thereof as may be found, and hold the same until further ordered by the Court for the purpose of satisfying any judgment that may be rendered against H. M. Blackmer in this proceeding."

That was in the nature of security against some penalty or fine that the Court might thereafter impose if it should become satisfied that he had wilfully refused to obey the commands of the rule to show cause. It does not follow that because so much was seized, therefore the fine would be equivalent to what was seized. That would depend upon what was developed at the hearing. There might be some matters of excuse or justification, or at least of mitigation, that would affect materially, perhaps, the judgment of the court in imposng a fine, or the amount of the fine. I do not think there can be any objection to the sufficiency of that. He knew, too, from this rule to show cause, that the marshal had been ordered, this very day, to seize this property, of

the amount and value of one hundred thousand dollars. He knew that.

He knew, too, by this order, that the marshal forwarded to the consul of the United States at Paris, the very consul who had served him with this subpœna, and to the consuls of the United States at any other place in France, or in any other countries where said H. M. Blackmer may be,
66 a copy of this order with a request that such consuls, or any one of them, shall make personal service thereof upon H. M. Blackmer and make prompt return thereof to the Clerk of this Court, and that the marshal was directed to make personal service of this order upon the said H. M. Blackmer, if he is found in the United States, and make prompt return thereof to the Clerk of this Court.

If the contentions of the able counsel for the respondent here are well founded, it would be well nigh impossible in a proceeding of this kind to get a witness who is a citizen of the United States, who happened to be in a foreign country, into this court to testify.

As for notifying them in advance of applications of this kind, it is an invitation to exclude themselves from any such further orders. It is not to be done for a moment. The administration of justice has its practical aspects, based upon a knowledge of human nature, a knowledge of men and women in the United States, their weaknesses and foibles. Of course, it must always proceed within the Constitution. Every citizen has a right to the safeguards accorded him by that great institution.

We have a great many technicalities to deal with here. That word is sometimes abused. Technicalities may be very sound and substantial. The word is often used very loosely. We sometimes hear it said, "Oh, that case was decided on a technicality"—a technicality that may go to the heart of the case.

At any rate, what have we? We have a criminal proceeding pending in this court, United States vs. Fall and
67 Sinclair. A witness, a citizen of the United States, at present absent in a foreign country, has personal knowledge of relevant material in the case thus being prosecuted. By the accumulation of other testimony the government may have proved a charge. Congress has declared in such a case, "Now, Mr. Citizen, when you are needed for

such a purpose by the Government of the United States you must obey subpœnas therein, in obedience to this act."

I cannot discover that there was a single failure to observe the substantial provisions of this act; and that in so doing, Mr. Blackmer was fully informed. To burden and encumber the record with copies of petitions and motions would be unnecessary. It would be easy enough to have very full notice in the rule to show cause. He could have come on, if he wanted to, and he could then read the motion and petition. This Court said "You come here, sir, and meet this charge, a charge stated in the order, for violation of the subpœna served upon you."

No, Mr. Battle. You must convence some other court of the soundness of your position so far as your pending motion is concerned. The motion is overruled.

68 *Decree.*

Filed Oct. 18, 1929.

* * * * * * *

And now, to wit, October 18th, 1929, the above entitled cause having heretofore come on for hearing on September 16th and 17th, 1929, before Siddons, J., upon petition and rule to show cause, plea, joinder of issue, demurrer and replication; and after a full hearing upon the aforesaid pleadings and the proofs and evidence adduced by the petitioner, United States, and the respondent, Harry M. Blackmer, and after full argument by counsel upon the demurrer and all questions of law, the petition that the above named respondent be adjudged in contempt is by the Court sustained and the respondent, Harry M. Blackmer, is accordingly found, adjudged and decreed in contempt of Court; and therefore it is considered, adjudged and decreed by the Court that for his said offense the respondent, Harry M. Blackmer, pay a fine of Thirty Thousand Dollars ($30,000), together with all the taxable costs of this proceeding; and thereupon the said respondent, by his attorneys, notes an appeal to the Court of Appeals of the District of Columbia from the judgment of the Court in this case; whereupon the Court fixes the amount of bond

for costs on appeal at Five hundred dollars ($500.) in the above entitled cause, which said bond shall be expressly conditioned that the property of the respondent (be-
69 ing United States Liberty Bonds of the par value of $100,000) heretofore levied upon and seized by the United States Marshal in Washington, D. C., under the order of December 26, 1928, of this Court, and now held by said Marshal to satisfy any judgment that may be rendered against the respondent in this proceeding, shall remain in the possession and custody of said United States Marshal under said levy and seizure pending the said appeal, and upon the entry of such bond there shall be a stay of proceedings; and in case the judgment appealed from shall be affirmed or the appeal shall be dismissed for any cause, the Court directs that the United States Marshal shall forthwith proceed to sell such of the United States Liberty Bonds of the par value of $100,000, heretofore levied upon and seized under the said order of December 26, 1928, as shall be necessary to satisfy in full the said fine of $30,000., together with all the taxable costs of this proceeding, such sale to be conducted upon the notice required and in the manner provided for sales upon execution.

F. L. SIDDONS,
Justice.

Memorandum.

October 21, 1929.—Undertaking on Appeal (supersedeas) $500.00 approved and filed.

November 8, 1929.—Time to file Bill of Exceptions extended to and including November 25, 1929.

70 November 25, 1929.—Proposed Bill of Exceptions filed.

Notice of time of presentation of Bill of Exceptions and acknowledgment of service.

Assignment of Errors of Defendant Harry M. Blackmer.

Filed Dec. 18, 1929.

* * * * * * *

Now comes the defendant, Harry M. Blackmer, and makes the following his assignment of errors in the above entitled cause:

The Court erred:

(1) In overruling and denying on June 6, 1929, the motion (dated February 23, 1929) made by Nathan L. Miller and George Gordon Battle, attorneys for defendant, specially appearing therefor, to vacate and set aside the Order to Show Cause of this Court dated December 26, 1928, and all proceedings pursuant thereto.

(2) In overruling and denying the motion of defendant, made at the trial of said cause and prior to the introduction of any testimony, on all the pleadings and proceedings herein for judgment that he is not guilty of contempt as charged herein and directing the release of his property within the United States heretofore seized or claimed to have been seized by the United States Marshal and that the proceedings be dismissed. (Motion appears at length in transcript of record and is Item 22 on the Designation of Record herein).

(3) In overruling defendant's objection to the taking of any and all testimony in his absence.

(4) In overruling and denying defendant's motion,
71 made at the close of the testimony in chief on behalf of the United States, to dismiss the proceedings on all the grounds theretofore specified (Assignment herein No. 2), and on the ground that the record then made up to date including the pleadings, proceedings and testimony, does not justify any finding of contempt against the defendant.

(5) In sustaining the objection of the United States to defendant's offer to put in evidence the testimony of one M. T. Everhart introduced upon the trial of the Sinclair case (United States vs. Harry F. Sinclair and Albert B. Fall, Criminal No. 43324).

(6) In sustaining the objection of the United States to defendant's proffer of proof that said testimony of said Everhart was available to the United States on the date of the petition for subpœnas, and at all times subsequent to December 31, 1927; and that defendant was so advised, and that such advise was a factor in his decision.

(7) In sustaining the objection of the United States to the relevancy of defendant's proof that the case United States vs. Harry F. Sinclair and Albert B. Fall, Criminal Docket No. 43324, was not called for trial on April 2, 1928;

that there were no proceedings in that case on Monday, April 2, 1928, at ten o'clock A. M., or at any other time on that date; that defendant was not called as a witness or otherwise, in said case by or on behalf of this Court at any time on April 2, 1928.

(8) In sustaining the objection of the United States to the relevancy of defendant's proof that defendant was not commanded by the alleged subpœna herein to attend
72 the trial of said case (United States vs. Harry F. Sinclair and Albert B. Fall, Criminal Docket No. 43324), on Monday, April 9, 1928, but was commanded to attend said trial on April 2, 1928; that no trial of said case was had on April 2, 1928.

(9) In overruling defendant's objection to the questions by the United States to the witness, George Gordon Battle, during his cross examination, relating to the state of mind of defendant with respect to certain letters rogatory issued to take defendant's testimony in the case of United States of America, Plaintiff v. Mammoth Oil Company, a corporation of the State of Delaware et al. defendants (In Equity 1431—U. S. Dist. Court, District of Wyoming).

(10) In sustaining the objection of the United States to the relevancy of defendant's proof that the first Sinclair trial (United States vs. Harry F. Sinclair and Albert B. Fall, Criminal Docket No. 43324) resulted in a mistrial and that the second trial which followed was upon the same indictment as said first trial.

(11) In overruling and denying defendant's motion made at the close of testimony for both sides that these proceedings be dismissed and the judgment be rendered on behalf of defendant, finding him not guilty of contempt and directing the release of his property, and dismissing these proceedings on each and every ground enumerated in the previous motions. (Assignments herein Nos. 2 and 4).

(12) In overruling defendant's objection to any judgment being rendered in his absence.
73 (13) In declaring and adjudicating defendant to be in contempt of this Court.

(14) In imposing a fine upon defendant of Thirty Thousand ($30,000) Dollars and costs.

(15) In charging the bonds (defendant's) in custodia legis with said fine and costs.

(16) In other respects apparent of record.

GEO. GORDON BATTLE,
Attorney for Defendant.

Service of copy of above Assignments of Error accepted this 18th day of Dec. 1929.

LEO. A. ROVER,
U. S. Attorney, D. C.

Designation of Record.

Filed Nov. 6, 1929.

* * * * * * * *

Now comes Harry M. Blackmer, the appellant in the above entitled cause, and designates the parts of the record which he desires to have included in the transcript, said parts being considered sufficient for the determination of the questions raised on appeal, namely:

1. Petition by attorneys for the United States executed January 9, 1928, for issuance of subpœna to James E. O'Neil and H. M. Blackmer under Act of July 3, 1926, in the case of United States v. Harry F. Sinclair and Albert B. Fall, Criminal No. 43324.

2. Order of January 9, 1928, granting subpœna.

3. Subpœna directed to H. M. Blackmer and return of service and tender by Consul thereon.

4. Petition of United States attorneys filed July 6, 1928, under Act of July 3, 1926, for rule to show cause against H. M. Blackmer why he should not be adjudged in contempt; Marshal to levy on $100,000 worth of property of defendant, including Exhibit A thereto attached.

74 5. Order to show cause dated July 6, 1928, by Bailey, J.

6. Order dated December 26, 1928, requiring defendant to appear February 25, 1929, to show cause why he should not be adjudged in contempt; Marshal ordered to levy on $100,000 worth of property of defendant.

7. Proof of publication.

8. Return of Marshal, attachment $100,000 Liberty Bonds of defendant, with schedule of levy and appraisement attached.

9. Return of Consul endorsed on copy of order of December 26, 1928, to show cause served on defendant January 21, 1929, at Paris, France.

10. Special appearance of Nathan L. Miller and George Gordon Battle for defendant with motion to vacate order of December 26, 1928, and all proceedings thereunder.

11. Affidavits of George Gordon Battle and H. M. Blackmer in support of motion to vacate.

12. Order of Siddons, J., postponing hearing of motion to March 25, 1929.

13. Order of Stafford, J., continuing hearing to April 25, 1929.

14. Order of Siddons, J., continuing hearing to May 25, 1929.

15. Motion of defendant to vacate proceedings overruled and defendant given twenty days to file answer.

16. Plea of defendant.

17. Demurrer of United States to subparagraph (*e*) of paragraph six of defendant's first pleas.

18. Demurrer to defendant's first, second, sixth, seventh, eighth and ninth further pleas.

19. Replication to subparagraph (*b*) of paragraph seven and subparagraph (*c*) of paragraph eight of defendant's first pleas.

20. Joinder in issue to paragraphs one, two, four, five, subparagraphs (*a*), (*b*), (*c*) and (*d*) of paragraph six, and subparagraph (*b*) of paragraph eight of the defendant's first pleas, and upon the allegations of fact contained in the defendant's third, fourth, fifth, tenth, eleventh and twelfth further pleas.

21. Docket entry showing hearing and trial of cause September 16 and 17, 1929.

75 22. Motion of defendant on pleadings for judgment.

23. Opinion of Siddons, J.

24. Decree adjudging defendant in contempt, ordering payment of fine of $30,000 and costs; appeal noted in open court, bond for costs fixed at $500, bonds seized under attachment to remain in custody of Marshal.

25. Undertaking on appeal.

26. Bill of Exceptions.

27. Notice of submission of bill of exceptions for settlement and approval.
28. Memo. bill of exceptions settled and approved.
29. Bill of exceptions.
30. Assignment of errors.
31. This designation of record.

GEO. GORDON BATTLE AND
SHERLEY, FAUST AND WILSON,
Attorneys for Appellant, H. M. Blackmer.

Memorandum.

January 6, 1930.—Bill of Exceptions submitted.

Supreme Court of the District of Columbia, Wednesday, January 15, 1930.

The Court resumes its session pursuant to adjournment, Mr. Justice Gordon, presiding.

* * * * * * *

76 Now comes here the respondent by his attorney Geo. Gordon Battle, Esquire, and prays the Court to sign and make a part of the record his Bill of Exceptions taken during the trial of the case and submitted to the Court on the 6th day of January, 1930, which is accordingly done, *nunc pro tunc.*

77 —Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 76, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in Contempt Cause No. 18, wherein United States is Plaintiff and Harry M. Blackmer is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 29th day of January, 1930.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

78 In the Supreme Court of the District of Columbia,
Holding a Criminal Term.

In Contempt. No. 18.

THE UNITED STATES

vs.

HARRY M. BLACKMER.

Amended Bill of Exceptions.

Be it remembered that at the trial of this cause commencing September 16, 1929, and terminating September 17, 1929, before Honorable Frederick L. Siddons, Justice, holding Criminal Court Number 2, proceedings were had and rulings made by the Court and exceptions taken and allowed on behalf of defendant as follows:

There appeared on behalf of the United States Atlee Pomerene and Owen J. Roberts, Esqs., special counsel, and Hon. Leo A. Rover, United States Attorney in and for the District of Columbia. On behalf of defendant, George Gordon Battle, Esq., of New York, New York, and Eugene D. Millikin, Esq., of Denver, Colorado.

Before any evidence was adduced defendant made and filed a motion on pleadings and proceedings for judgment that he is not guilty of contempt as charged in the Petition for Order to Show Cause and directing the release of his property within the United States heretofore seized or claimed to have been seized by the United States Marshal and that the proceedings be dismissed (Motion appears at length in the transcript of record and is item No. 22 of the Designation of Record herein.)

The motion was overruled and denied by the Court, to which ruling exception was duly taken and allowed on be-

half of defendant (Opinion of Siddons, J. overruling and denying this motion appears at length in the transcript of record and is item No. 23 of the Designation of Record herein).

79 Counsel for the United States then proceeded to present testimony on its behalf.

Mr. Roberts: I call your Honor's attention to the fact that paragraph 1 of the plea, subparagraph (*a*), admits presentation of a petition of January 9, 1928, for a subpœna for Blackmer, and admits that Mr. Blackmer is a citizen of the United States.

Mr. Battle: I beg your pardon, I did not catch what you said.

Mr. Roberts: I said that for the convenience of the Court I would like to call his attention to the admissions in your pleading. I will then try to call his Honor's attention to some things of which I shall ask him to take judicial notice, and then I will offer proofs of things as to which he cannot take judicial notice. That is the orderly procedure.

Mr. Battle: Quite right. I object, if your Honor please, to the offer of any proof in the absence of the defendant.

The Court: Overruled.

Mr. Battle: I note an exception.

Mr. Roberts: I call your Honor's attention to the fact that paragraph 2, sub-paragraph (*a*) admits the Court order of January 9th, 1928, for the issuance of subpœnas to Blackmer in foreign parts, and that on the same day subpœnas did issue. I call your Honor's attention to the fact that paragraph 3, sub-paragraph (*a*) admits that the subpœnas commanded Blackmer to appear on April 2, 1928, for the trial of the Fall-Sinclair case, criminal No. 43,324. I call your Honor's attention to the fact that paragraph 4, sub-paragraph (*a*) admits that the Court order of January 9, 1928, provided for the tender to Blackmer of $500 for necessary traveling expenses; and I call attention to the fact that paragraph 5 sub-paragraph (*a*) admits the service of the subpœna on February 1, 1928, by Consul Orr, at Paris, and the tender of $500 by him, and that Blackmer refused the tender.

80 I should say, in connection with that admission, that it admits the service by somebody, but it says in another place that they do not admit that Mr. Orr was the

Consul of the United States at that time, I shall prove it in due course.

I call your Honor's attention to paragraph 6, sub-paragraph (*a*) which admits the return of the service and the return of the fact of tender made by Consul Orr and admits that a true copy of the subpœna and return are attached to the petition as exhibits of the government in its petition for a rule to show cause.

I call attention to the fact that paragraph 7, sub-paragraph (*a*) admits that the trial of the Fall-Sinclair case was continued by the Court to Monday, April 9, 1928.

I call your Honor's attention to the fact that paragraph 8, sub-paragraph——

The Court: Continued on April 2nd?

Mr. Roberts: It does not say. It says continued by order of the Court. Set for April 2nd and continued by order of the Court to April 9th. Paragraph 8 sub-paragraph (*a*) admits the trial of the Fall-Sinclair case commenced on April 9, 1928; that special counsel requested the Court Clerk to call Blackmer. That Blackmer was called and did not respond or appear.

Mr. Roberts: I now ask your Honor to take judicial notice—and, as you do take judicial notice, I merely refresh the memory of the Court by referring to the following matters:

(*a*). The petition of January 9, 1928, signed by your Honor, for the issuance of the subpœna in criminal case 43,324.

(*b*) Your own order, sir, of January 9, 1928——

The Court: I did not understand that. You say the petition signed by me?

Mr. Roberts: No; signed by special counsel. Did I say signed by you? I meant presented to you.

(*b*) The Court order of the same date, signed by your Honor, authorizing the issuance of the subpœna.

81 (*c*) Your Honor's order of July 8, 1928, directing an order to show cause——

The Court: I will take judicial notice of all the papers in the case.

Mr. Roberts: Then I shall not enumerate them. I thought it might be convenient to you to have them right there in their order.

Mr. Roberts: Mr. Quigley will you take the stand please.

Mr. Battle: My objection, if your Honor please, runs to all this testimony. Objection is made to the testimony taken in the absence of the defendant.

The Court: I understand. It is overruled.

Mr. Battle: I wish my objection to be understood as running to all this testimony.

The Court: I understand. You object to any testimony being taken here—proffered by the Government or taken by the Court, in the absence of Mr. Blackmer?

Mr. Battle: Yes.

The Court: You need not repeat the objection, it goes to all that.

Mr. Battle: And I except to the ruling of the Court.

Whereupon **Stephen H. Quigley**, produced as a witness on behalf of the United States, being first duly sworn, was examined and testified as follows:

I am an employee of the Department of State in Washington, as a clerk in the clerical, administrative and fiscal service. It is my duty to keep a register on record showing the appointments of United States Consuls. The records (produced by witness) of the Department show that Mr. George Orr, Consul of the United States was assigned as Consul at Paris on June 6, 1925; that he remained assigned as Consul at Paris until July 2, 1929.

Whereupon **Wilbur J. Carr**, produced as a witness
82 on behalf of the United States being first duly sworn, was examined and testified as follows:

I am an Assistant Secretary of State of the United States; I know Mr. George Orr. Mr. Orr remained a Consul of the United States at Paris, France, from June 6, 1925, until July 2, 1929, to my personal knowledge. I have never heard of another George Orr at Paris, and did not communicate with any other George Orr to procure service of the Blackmer papers. I communicated with the George Orr in question to serve these papers at the request of the Marshal.

Mr. Roberts: The Government rests if your Honor please.

Mr. Battle: If your Honor please, at the close of taking of testimony on behalf of the Government I want to renew

my motion to dismiss the proceeding on all the grounds heretofore specified and on the ground that the record now made up to date, including the pleadings, proceedings, and testimony, does not justify any finding of contempt against respondent. I ask that the proceeding be dismissed on that ground.

The Court: Overruled.

Mr. Battle: I respectfully note an exception.

Counsel for defendant then proceeded to introduce testimony on behalf of defendant.

Mr. Battle: If your Honor please, I call your Honor's attention to the Tenth Further Plea, on page 14, which alleges that the testimony expected from defendant, as alleged in said Petition for Order to Show Cause, in United States of America v. Harry F. Sinclair and Albert B. Fall, Criminal Docket No. 43324, if admissible at all would have been circumstantial in character and only of inferential, if of any value; that the direct testimony introduced in said case by the United States through its witness, one M. T. Everhart, covering among other matters the same ground expected to be covered by defendant as alleged in the said petition to show cause, would have rendered the expected testimony of defendant inadmissible;

83 that said witness Everhart and his testimony were available to the United States on the date of said petition for subpœnas and at all times subsequent to December 31, 1927; and defendant was so advised and such advice was a factor in his decision not to respond to the said subpœna alleged to have been served upon him.

The Petition for the Order to Show Cause, which specified the testimony that was expected from the defendant, is in evidence, and I will ask to put in evidence the testimony introduced upon the trial of the Sinclair case, the testimony of M. T. Everhart.

Mr. Roberts: We object, if your Honor please, to the introduction of the testimony in the Sinclair case of M. T. Everhart for the reason that if all matters alleged in that plea were true they would be irrelevant to any issue here. Many a witness is subpœnaed, and when he is actually in court and called is excused because his testimony has been supplied by somebody else. But this plea is full of con-

clusions of law to the effect that because one witness was called, some other witness's testimony would have been inadmissible assuming what the Court would have ruled. Suppose we had to put this witness on the stand and the Trial Judge had said, "In view of something you have put on before, I will not permit this witness to testify." Can the witness refuse to come to court because he thinks that when he gets there some judge will rule that his testimony is inadmissible because of something else, he, the witness, thinks will happen when he gets there; that is that some other witness will be called? That is this proposition, that a witness can set himself up and say, "It is no use for me to go to court, because I understand that when I get there, they are going to call a man named Everhart, and my testimony will be inadmissible. Therefore, I am not going."

The Court: Does it follow that his evidence would have been inadmissible?

Mr. Roberts: No, sir, it would have been cumulative. We had some direct and some circumstantial evidence. It would have been cumulative. Of course, that proposition
84 of law is ridiculous, assuming that it is true that the witness can set himself up and say, "because they will have somebody else there, I will not need to go."

Mr. Battle: Everhart did actually testify.

Mr. Roberts: And in previous proceedings he had refused to testify, and had been sustained. Had we the right to expect that we would get his testimony in this particular trial?

Mr. Battle: After December 31, 1927, that act had been passed which permitted him complete immunity, and from that time on his testimony was available.

Mr. Roberts: I stand on my objection, that it is speculation by the witness as to what will happen when he gets on the trial. He cannot set that up as an excuse for not obeying your Honor's order.

Mr. Battle: I press the offer.

The Court: I think, Mr. Battle, that at the most—and I am not even saying that it is so—the matter undertaken to be set up here might go to some question of mitigation of punishment. It is no answer to the refusal to obey the command to be here.

Mr. Battle: Your Honor sustains the objection?

The Court: Yes.

Mr. Battle: I respectfully except.

I will offer to prove that his testimony was available to the United States on the date of said petition for subpœnas, and at all times subsequent to December 31, 1927; and that the defendant was so advised, and that such advice was a factor in his decision.

Mr. Roberts: I object to that, if your Honor please, on the ground that counsel cannot tell a witness that some other witness will be at the trial, and therefore his client does not need to go.

The Court: I have already overruled it.

Mr. Battle: I except.

Mr. Battle: I am now addressing myself to sub-division (*b*) of paragraph 7 of the plea, which reads as follows:

"Alleges that said case (the United States v. Harry
85 F. Sinclair and Albert B. Fall, Criminal Docket No. 43324) was not called for trial on April 2, 1928, and that defendant did not receive due or lawful notice that the trial of said case was continued to April 9, 1928; that there were no proceedings in said case on Monday April 2nd, 1928, at 10 o'clock a. m., or at any other time on that day; that defendant could not have testified in said case on April 2, 1928, on behalf of the United States, or otherwise, had he then appeared in response to said subpœna; that defendant was not called as a witness or otherwise, in said case or by or on behalf of this Honorable Court, at any time on April 2nd, 1928."

The Petition for the Order to Show Cause does not contain any allegation that the defendant was not here on April 2nd.

The Court: Can you tell off hand when the order continuing the trial to April 9th was actually made?

Mr. Battle: It was made on March 22nd. On March 22nd application was made for a continuance. I have the minutes of the court proceeding on that day. On March 22nd the Court said: "I will set this case for the 4th of April, that is Wednesday." The Court said: "This case has been set for April 2nd for several months and I have now set it for the 4th day of April." That was on March 22nd, according to the records of this Court. The trial day was

changed from the 2nd to the 4th. Then, on the 3rd, the day after the 2nd——

The Court: Let me interrupt you further. I cannot remember all these details. There must have been some sort of matter suggested to the Court.

Mr. Battle: There was. A continuance was asked for the purpose of taking Secretary Fall's deposition.

Mr. Roberts: Mr. Battle has that wrong, if your Honor please. The way the meeting came to be held on March 22nd was that the Government moved for a severance, and to try Harry F. Sinclair alone. When we gave notice of that motion we received notice that there would be objection to that severance. We came into court on the 22nd of March and it was then stated that Mr. Fall would not be
86 able to be at the trial of April 2nd; that he was entitled to be at the trial, and that we were not entitled to a severance. Judge Bailey overruled that and rendered the severance. Then our friends on the other side said that if there were a severance so that Mr. Fall who was then ill, could not be in court, they ought to have the right to take his deposition. We replied that they had had months to take his deposition, and Judge Bailey said in effect that he had not much sympathy with this late application for that purpose, but that if the parties could get out to El Paso, Texas, and take that deposition he would afford two extra days, and he would therefore not convene the trial which was set for April 2nd until April 4th. Senator Pomerene then rushed off to take the deposition with counsel for the other side. Being set for the 4th, if your Honor please, on the 3rd Mr. Hoover came in again before Judge Bailey and gave me notice. Senator Pomerene was then on his way East from taking this deposition and had not arrived, but was due to arrive on the 4th. The train on which he was was wrecked and he wired me that he would not get in on the morning of the 4th, but that I should proceed with the trial until he got there. Mr. Hoover represented that they needed a few extra days to get this deposition typed, it being a very lengthy one and to get the Commissioner's return, and that they would not be prepared to go on on the 4th. Mr. Justice Bailey then said that as Good Friday intervened it would hardly be worth while to allow one or two extra days to-wit the 5th or 6th, and he would consequently again adjourn the opening of the trial until April 9th. I

think that is a full and complete statement of everything that occurred.

Mr. Battle: The point is that the adjournment of the case, which was set for April 2, which was the day on which Mr. Blackmer's subpœna called for his attendance, was made on March 22nd. I am reading from the minutes of the court. Mr. Leahy said:

"If your Honor please, in the case of United States versus Sinclair and Fall, on behalf of the defendant
87 Fall, I am moving at this time for a continuance of the trial of this case, which was set on the 2nd of April."

Then Mr. Leahy mentioned the supporting affidavits, and the Court said: "I will set this case on the 4th of April."

Then the Court went on to say: "This case has been set for April 2 for several months, and I have now set it for the 4th of April."

Mr. Battle: My claim is that on the 2nd of April there were no proceedings in court; no directions were given to any witness to attend at any later date. Therefore my client cannot be held for contempt for not having been here on the 2nd. It is conceded, from Mr. Robert's statement, and from what I have just read from the record, that an order was made by Mr. Justice Bailey in this court on March 22nd changing the date of the trial from April 2 to April 4. It is also stated that on April 3, the case was further adjourned until the 9th.

I offer to prove, by the dockets of the Court here, that there is no record of any proceeding in the case of United States versus Sinclair and Fall, on April 2. The criminal docket will show that. Mr. Millikin, my associate, has examined the docket and tells me that there is no entry.

The Court: That is your offer?

Mr. Battle: That is my offer.

The Court: Have you anything to say, Mr. Roberts?

Mr. Roberts: I object to its relevancy, if your Honor please, it being the fact that the subpœna required the witness to come here on April 2 and not to depart the court without the leave of your Honor, or the presiding Justice, whoever he might be, and/or the District Attorney. It was his duty, I submit, to report himself and have news, then,

from the District Attorney or from your Honor's clerk, of the day he should attend in lieu, because obviously,
88 the subpœna held, under the circumstances I have stated, for any two or three day adjournment of a trial which had, as Mr. Justice Bailey said, been fixed for months.

The impracticability of your notifying a witness who is coming from a great distance, if your Honor please, of a two or three or five day adjournment must be obvious to the Court. The very circumstances that occurred in this case illustrate it. We had witnesses coming from the Pacific Coast. We could not notify them of the adjournment to the 4th of April, or the 9th of April, either one, in time to stop them. We did not dare to try to stop them. We had to let them come, and they did come, and, like good citizens waited, when they arrived here and found they were not needed until the 9th. They received witness fees while they were here, because it was not their fault. That was their duty, and it was his duty, and I submit it would be irrelevant as a defense in this case.

Mr. Battle: Our contention, if your Honor please, is that there was no meeting of this court on April 2nd. If this court had met on April 2nd and instructions had been given for any witnesses who were in attendance to come back on the 9th, that would be an entirely different situation. What we are complaining of here is that our client was subpœnaed to appear on April 2; that on the date he was called upon to appear, there was no court here at all in that case; no direction was given to witnesses on that day, and under those circustances he cannot be held for contempt.

Mr. Battle: That case was not on the calendar. That case was not called. No direction was given to the witnesses. So far as that case is concerned there was no court here.

The Court: I shall be very much surprised if you find authorities for that proposition. The possible disastrous effect of any such ruling is perfectly obvious, in the administration of justice in any court, it seems to me. Here we have a simple matter—by "simple" I mean irrespective

of the legal contentions you have been making here
89 as to the constitutionality of this act, and so forth.

Here we have a criminal case pending in this court, and in preparation for its trial the prosecutor has issued, or caused to be issued by this court, subpoenas to witnesses who, he believes, will be necessary to support the indictment at the trial. He does that. Among them, under the act in question, the Walsh Act, he has this witness in Paris subpœnaed to be here on the 2nd. He does not obey the command. You have stated the reasons he assigns for it, from the standpoint of the legal questions here presented, but the fact remains that he did not obey that subpœna to be here to testify on behalf of the Government in that case; and because an adjournment of the trial of that case was ordered on the previous day, on application, and after hearing the parties, the prosecution and the defendants named in that case, these orders were passed, to which my attention has been called. What has this witness got to do with all that?

Mr. Battle: I will tell your Honor exactly what he has to do with it, in my view of it. He was called upon to appear here on the 2nd. Nothing would have been easier than for the clerk of the court to call that case on the morning of the 2nd and give instructions to any witnesses who were subpœnaed to appear, to attend on the adjourned date. That is the usual and customary practices in cases of adjournment. Ten days before that time an order had been made by the court adjourning it until a later day, until the 4th. On the day when my client was subpœnaed to appear here, the case does not appear on the calendar at all. No instructions were given by the clerk, and, so far as the record shows, nobody here was interested in the case.

The Court: What you are now saying might make a very strong appeal in the case of a witness who had obeyed the summons and come only to find that some days before the court, on a showing made by the prosecution, after hearing counsel for the defendants, adjourned the trial to a later
date than that called for in the summons. Under
90 such circumstances, if the witness had come to the court on the 2nd day of April, there might be some question whether he could be adjudged in contempt. But this witness was not confronted with anything of that kind.

He did not come. He declined to come. He refused to obey the command of that summons. It does not lie in his mouth, it seems to me, now to make complaint about this adjournment. I think the objection of want of relevancy and materiality is sound, and I sustain the objection.

Mr. Battle: I want to say, if your Honor will allow me just for a moment, that this is an application to hold him for contempt for not appearing here, and our position is that the Government must show that they complied with all the requisites on their side. He was subpoenaed here to appear on the 2nd, and before they can hold him for contempt they must show that the case was called on the 2nd and that instructions were given to witnesses to appear at a later date, or that some notice was given to this witness of an adjournment.

The Court: I think I grasp the implications of your argument, Mr. Battle, but I cannot see that it overcomes the simple fact that this witness refused and declined to obey the command of this summons. He gives the reasons through his able counsel. I think the objection on the ground of want of relevancy and materiality is sound, and I sustain the objection.

Mr. Battle: I respectfully except, your Honor.

I offer to prove now that this case, United States versus Harry F. Sinclair and Albert B. Fall, Criminal Docket No. 43,324, was not called for trial on April 2, 1928; that there were no proceedings in that case on Monday April 2, 1928, at 10 o'clock a. m., or at any other time on that date; that defendant was not called as a witness, or otherwise, in said case, by or on behalf of this Honorable Court, at any time on April 2, 1928. That is my offer.

The Court: That is your proffer?

91 Mr. Battle: Yes.

Mr. Roberts: For the purpose of the record, if your Honor please, we admit that those facts alone are true.

Mr. Battle: Your objection to the proffer is withdrawn?

Mr. Roberts: No, I admit that the facts as stated in that proffer are true. That relieves you of proving them.

The Court: It is now of record that the Government admits that the facts you seek to prove are true, not at all waiving the objection.

Mr. Roberts: Not at all waiving the objection to the relevancy of the other matters.

The Court: That simplifies your task.

Mr. Battle: I understand objection is made solely to the relevancy of the evidence, and, as to that, it is sustained by the Court.

The Court: Yes.

Mr. Battle: I respectfully except.

Mr. Battle: In paragraph 8, your Honor, of the plea, subdivision (*c*), as follows:

"Alleges that defendant was not commanded by said alleged subpœna to attend the trial of said case on Monday, April 9th, 1928, but was commanded to attend said trial on April 2, 1928; that no trial of said case was had on April 2, 1928, that defendant was not lawfully bound to attend the trial of said case of April 2, 1928, on April 9, 1928, or at any other time."

the same point is raised and I make the same proffer.

Mr. Battle: I offer to prove, under that sub-paragraph what is alleged there.

Mr. Roberts: I admit that the facts stated in the following parts of that sub-paragraph are true, to wit:

"That defendant was not commanded by said alleged subpœna to attend the trial of said case on Monday April
9, 1928, but was commanded to attend said trial on
92 April 2, 1928; that no trial of said case was had on
April 2, 1928,"

but I do not wish my admission taken to cover the last clauses, to wit,

"that defendant was not lawfully bound to attend the trial of said case on April 2, 1928, on April 9, 1928, or at any other time,"

as that pleads a conclusion of law.

Mr. Battle: I do not ask for that. I am asking only, of course, for an admission as to the facts.

The Court: As I understand it, this admission of yours, Mr. Roberts, is for the purpose of the record.

Mr. Roberts: Yes, sir.

The Court: You admit that the statements made there are true as a matter of fact?

Mr. Roberts: I also wish my admission to be taken in connection with the language of the subpœna itself, which is not included in the wording of that plea, namely, that he was to remain and not depart the Court without leave of the District Attorney or the Court.

Mr. Battle: That is in evidence, of course.

The Court: I am not at all satisfied with your admission, Mr. Roberts. If I view the matter correctly, the command of this subpœna to be here on the 2nd and obey that subpœna, commanded him to appear here at a later date.

Mr. Roberts: Yes, sir, it did. It commanded him to appear at any later date.

The Court: You are admitting——

Mr. Roberts: I admit merely that the subpœna referred to a trial on April 2.

The Court: That is, the subpœna, in its language, indicated April 2 as his first appearance.

Mr. Roberts: Yes.

The Court: Not his later appearance.

Mr. Roberts: Not that he had any right to leave
93 at that time any trial.

The Court: With that undertsanding of the extent and scope of your admission, you are absolved from the necessity of proving it, Mr. Battle.

Mr. Battle: Of course, the subpœna is in evidence, and the words of the subpœna speak for themselves.

The Court: There has not been any objection made.

Mr. Roberts: I object to its relevancy, if your Honor please, unless it is followed by other or different proof than comprehended in the proffer. Your Honor will observe that there is nothing in that proffer to the effect that the witness obeyed the subpœna, was here on April 2, and could not find a court.

Mr. Battle: There is no allegation in the petition that he was not here, either.

Mr. Roberts: No, certainly not.

The Court: The Court is not prepared to say or believe that this subpœna that ordered him to appear on April 2, did not include in it the requirement that he should be present at any later date the court might sit. So that, whatever the bare naked fact may be as to the precise language of the

subpœna with reference to this date of April 9, I think the proof that it did not contain specifically April 9 as a date is irrelevant and immaterial, and I sustain the objection to that.

Mr. Battle: I respectfully except, your Honor.

Mr. Battle: If your Honor please, I now will take up the 11th further plea. The issue is joined on that. That plea reads:

"That after the alleged service of the pretended subpœna referred to in paragraph 5 of said Petition for Order to Show Cause, defendant, desiring to perform his legal obligations (if any), obtained opinions in that regard from several attorneys-at-law of high repute in the United States; that he was advised by each and all of said attorneys after full consideration, that he was not under any such obligation, but that on the contrary, said alleged service
94 and the proceedings purporting to authorize the same, and the provisions of said Act of Congress were unconstitutional and wholly void and of no force for the reasons hereinbefore mentioned, and relying on such advice defendant did not appear according to the purported demand of said pretended subpœna so illegally served."

Whereupon **George Gordon Battle** was called as a witness on behalf of defendant, and, having been first duly sworn, testified as follows:

My name is George Gordon Battle. I am an attorney at law, and have been practicing for about forty years.

Mr. Pomerene: We will admit that the witness is eminent counsel.

The Court: I think there is no question as to Mr. Battle's qualifications. I assume that special counsel are agreed that he is a qualified witness.

Mr. Pomerene: Certainly.

Mr. Battle: I was in Paris, France, in the summer of 1927, just after these subpœnas had been served on Mr. Blackmer and saw Mr. Blackmer there at that time. I discussed with him the constitutionality of the Walsh Act and of the procedure under the Walsh Act, and advised with him as to what his action should be with respect to responding to the subpœna mentioned in the Petition for the Order to Show Cause in contempt No. 18. I told him that we had consid-

ered very carefully the question of the constitutionality of the Walsh Act; that we had obtained opinions on it of several different lawyers including Mr. Henry McAllister, of Denver, Colorado, a lawyer of great distinction and eminence; Mr. Karl C. Schuyler, also of Denver, Colorado, a distinguished lawyer; Mr. George E. Holmes, of New York, a distinguished and well known lawyer of the New York Bar.

The Court: Where was Mr. Blackmer's original native city or state?

Mr. Battle: He came originally from Massachu-
95 setts, your Honor. He went West on account of his health when he was a young man, and went first to Cripple Creek, I think, in the early days, and Colorado Springs. He was an attorney at law there.

The Court: Where was he living in the United States when he left the United States to go abroad?

Mr. Battle: Denver. That was the occasion for my consulting these Denver counsel. I told Mr. Blackmer that the advice of all these lawyers, their opinions and my opinion, the opinion of Mr. Millikin, and of my own partners, all of whom had carefully examined the Act, was that the Act was unconstitutional, and therefore that the subpœna was not a valid obligation upon him. Mr. Blackmer said he wanted our advice and would rely upon it. I also told him that Senator Charles S. Thomas of Colorado had given an opinion that in his judgment the Walsh Act was entirely unconstitutional. Mr. Blackmer said he would depend upon and follow the advice we gave him at that time. Later, after the subpœnas issued and the proceedings had started, I told Mr. Blackmer that Governor Miller had examined the Act and that he gave the same opinion. I advised Mr. Blackmer that the Act was unconstitutional, that it was void, and that the whole proceedings under it would be void.

Cross-examination.

By Mr. Roberts:

Mr. Battle: Mr. Blackmer was a lawyer and I was his counsel even considerably before this subpoena went out. I knew that letters rogatory were issued to take his testimony in the suit in Wyoming.

Mr. Roberts: And you knew that he refused to give more than his name and age?

Mr. Millikin: Your Honor, I object to the question as incompetent, irrelevant and immaterial. The Wyoming case is not in this proceeding.

Mr. Roberts: I want to show this man's mind toward his Government, his willingness to serve it, and his unwillingness to serve it. If this is offered in mitigation, if your Honor please, your honor has a right to know what this man's attitude was.

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Mr. Millikin: This is offered as a part of the pleadings and answer of this defendant. Under the testimony that has been permitted, it is not mitigatory at all.

Mr. Roberts: It would be anything but mitigation. Your Honor is familiar with the Chapman case. Your Honor is familiar with the Sinclair case, and the Cook case. The order of proof is immaterial here. We did not object to it because we knew he would be allowed to state it. It cannot be a defense when a man deliberately asks his lawyer to advise him, and says, "on that advice I will not obey the order of the court." That cannot be a defense. If that were true, every man who was ever summoned into court would get out of his obligation by hiring some lawyer and paying him, and taking his opinion that he did not have to come.

The Court: I judge, from the character of the question put, to which objection is made, that it is designed to bring out the fact that Mr. Blackmer had refused any information about himself. As I understood the objection, he refused to give his name.

Mr. Roberts: No. He gave his name and age, and then refused to answer any further questions.

Mr. Millikin: If your Honor please, we object——

The Court: Was this prior——

Mr. Roberts: This was prior to this subpœna. It was in the suit of United States versus Mammoth Oil Company, Mr. Sinclair's company, of the District of Wyoming, in which the same plaintiff was seeking civil remedy on the same question for which it sought criminal remedy in this court.

The Court: State your objection again, please, Mr. Millikin.

Mr. Millikin: We object to the line of questioning for the reason that the suit referred to by Mr. Roberts has no connection whatever with these proceedings. Second,
97 that the state of mind of the defendant in another proceeding has no relevancy to the issues in this case. Third, that the testimony being offered here is not by way of mitigation, but was a part of the defense set out in the answer of this defendant, and that the objection comes too late. If we are going into what Mr. Blackmer's mind was in the Mammoth case at Cheyenne, that involves a very vast record that ought to be brought here so that we will know exactly what was said there, and to be properly introduced. I do not take it we are here for that purpose.

The Court: As I understood the purport of the question on cross-examination, it was merely designed to bring out the fact from Mr. Battle, that Mr. Blackmer, the witness in this case, desired by the Government, was desired by the Government as a witness in a Civil proceeding.

Mr. Millikin: Yes.

The Court: At an earlier date, prior to these proceedings; and that beyond giving his name and age, he declined to testify in the case. I do not know under what circumstances; whether this declination of his occurred in the execution of letters rogatory.

Mr. Roberts: I will ask Mr. Battle. He knows all about it. He can tell us.

The Court: Suppose you do that.

Mr. Roberts: Mr. Battle, you were Mr. Blackmer's counsel——

Mr. Millikin: Has your Honor ruled on my objection?

The Court: Not yet.

Mr. Roberts: You were Mr. Blackmer's counsel when the case of United States versus Mammoth Oil Company, and others, was being tried in the District Court of Wyoming, were you not?

Mr. Battle: I was Mr. Blackmer's counsel.

Mr. Roberts: And you were attending that trial as his counsel, and observing that trial for him throughout, were you not?

98 Mr. Battle: At Cheyenne.

Mr. Roberts: And you know that that was an equity case, founded on allegations of fraud and conspiracy against

the Mammoth Oil Company, and asking for the cancellation of the Teapot Dome lease, do you not?

Mr. Millikin: I object. I take it, your Honor, that my objection goes to all these questions.

Mr. Roberts: These are preliminary.

The Court: I had reserved ruling on your original objection because I made the suggestion to counsel that I wanted to know more about the circumstances under which it is said that Blackmer declined to testify in the civil suit, before I ruled on your objection as to the relevancy.

Mr. Millikin: I would like to have the record show our objections to these preliminary questions, because they are bringing in and developing, through the answers of the witness, the very things we are objecting to.

Mr. Roberts: Mr. Battle, answer my last question.

The Court: I will overrule that objection.

Mr. Millikin: I note an exception, your Honor.

Mr. Battle: Yes, sir, I think that correctly states it. As Mr. Blackmer's counsel I am familiar with the fact that in the bill of the Mammoth Oil Company case, Mr. Sinclair was charged amongst other things, with conspiracy with Mr. Fall, as in the criminal cases; that there was an application made to the United States District Judge at Cheyenne to take the testimony of Mr. Blackmer on the issues, amongst others, of conspiracy to defraud the United States; that letters rogatory were issued by Judge Kennedy, of that court, addressed to a French Court to examine Mr. Blackmer before them on certain questions propounded by the Government touching this alleged conspiracy.

By Mr. Roberts:

99 "Q. And you know that you went abroad and advised with Mr. Blackmer at that time? A. I was abroad at that time.

"Q. And as a result of this, when the letters rogatory were exposed to Mr. Blackmer and the questions propounded to him by a French judge of a French court, he answered the first two questions, that his name was Harry M. Blackmer, and gave his age, and then said he refused to answer any further questions of the Government on the matter. That is correct, is it not? A. He declined to make any further answer, and the court sustained his declination.

"Q. Then, under your advice, he refused in the civil matter to give the Government the benefit of his testimony. Am I right? A. No; I advised him as to his legal rights."

Mr. Millikin: It is now past the preliminary state, if it please your Honor.

The Court: Nothing is going in that affects your original objection, which is still pending and to be decided.

"By Mr. Roberts:

"Q. Coming to the question of this subpœna issuing out of this criminal court, you of course said to Mr. Blackmer that the penalty, if you should be wrong in your opinion would be a contempt proceeding and punishment of him for contempt, did you not? A. He knew the provisions of the Act. I told him the provisions of the Act.

"Q. Therefore he was entirely familiar and you discussed the fact that if you and this other array of legal gentlemen were wrong he must suffer the penalty? A. He knew the provisions of the Act. I cannot say we specifically discussed them.

"Q. Did you discuss what would probably be done to him if you were wrong in your views? A. I recall distinctly telling him what the provisions of the Act were, and to that extent——

"Q. Then so far as his action can be characterized, it was absolutely deliberate, was it not—after the fullest consideration? Yes or no. A. He gave it the most careful consideration.

"Mr. Roberts: That is all, sir.

"The Court: That brings us to the consideration of your original objection."

Mr. Millikin: Will your Honor now rule on the objections as made?

The Court: Your original objection?

Mr. Millikin: Yes, your Honor.

The Court: As the matter appeals to me, it is in this wise. We are hearing simply the allegations of contempt of the process of this court in this criminal proceeding, the refusal of the witness to obey the subpœna that was issued and served upon him; and the testimony that Mr. Battle

has given us shows that in another and earlier proceeding, a civil proceeding in which, allowing for the difference between the one being civil and the other criminal, the basis of both is essentially the same. The charge was conspiracy to defraud. That was the indictment was it not? And that seems to have been the basis in part, at least, of the civil proceeding instituted, in which civil proceeding Blackmer was to be examined as a witness for the Government and he declined to give his testimony. We do not have precisely the same situation. In one case we have Blackmer refusing in the criminal case to obey the subpœna issued by this court. Mr. Battle has given his testimony as to how that came about, that it was under his advice as counsel that Blackmer refused obedience to the summons. He has stated the reasons which actuated him in giving that counsel and advice to Blackmer.

We have a rule of evidence that it seems to me is applicable here, that while we may not establish the guilt
101 of a person in one case by reason of the fact that he has been guilty of similar acts, ordinarily, when the question on trial is one that involves intent, motive, purpose, a state of mind, then light is shed upon that state of mind by similar acts or substantially similar acts by the party involved; and the fact that in this somewhat earlier civil proceeding involving, as I have said, and as I understand the matter, practically the same predicate for the assertion by the Government in this civil proceeding that is made herein the indictment in this criminal case, it is competent to consider it with reference to whether as a matter of mitigation or as a matter of absolute defense it is a defense that should be considered by the court in this case. I think the evidence is competent on cross-examination.

Mr. Battle: If your Honor will permit me to say that it might be inferred from what your Honor has said that your Honor was of the opinion that these other lawyers and myself had advised Mr. Blackmer not to obey the subpœna and not to come to court. That is not the fact.

The Court: I did not think so. Your testimony was that you gave him your best opinion as to this Act and the proceedings under it.

Mr. Battle: That is correct.

The Court: I did not understand from your testimony

that you, a lawyer and a member of the bar, told this man to violate a court order.

Mr. Battle: None of the lawyers were asked on that point. We were asked to give our opinion on the constitutionality of that Act, and that we gave.

The Court: I understand that; and I understood your testimony to be this, that having given your opinion that the Act was void, and therefore the proceedings under it were void——

Mr. Battle: He asked us for our opinion and we
102 gave it. I would also say in regard to the letters rogatory that Mr. Blackmer depended upon the opinion of French counsel that he was not under any obligation to answer the questions addressed to him in the French court.

Mr. Pomerene: That was under French jurisprudence.

The Court: I remain of the opinion that counsel have not gone beyond the legitimate scope of cross examination in this case with respect to this single point, and I think your objection should be overruled.

Mr. Millikin: I save an exception, please.

"By Mr. Millikin:

"Q. I would like to ask you, Mr. Battle, whether you did tell Mr. Blackmer that Senator Thomas, Mr. Schuyler, Mr. McAllister, Mr. Levy and Mr. Holmes had advised the same? A. I did.

"The Court: He did say that, and he has just now added that French counsel advised similarly.

"The Witness: As to letters rogatory; that being the proceeding in the French court.

"The Court: The French court was the functionary authorized under our act of Congress to execute the letters rogatory.

"By Mr. Roberts:

"Q. Is it not the fact that French counsel advised that the French courts under their law had no power to compel Mr. Blackmer to reply, and that if he stood silent he could not be punished under the French law? A. The French counsel advised that he was under no obligation to answer.

"Q. Did they not advise that if he did not answer he could not be punished under French law? A. I do not recall that he did.

"Mr. Roberts: That is all."

Mr. Battle: Coming now to the 12th further plea
103 I call the Court's attention to the records of the court—I do not think it is necessary to offer them in evidence—that the first Sinclair trial resulted in a mistrial, and the second trial which followed was upon the same indictment as the first trial which resulted in a mistrial. There was, first, a mistrial, and then a completed trial upon the same indictment. The facts are that the first trial resulted in a mistrial and that the second trial was on the same indictment as the first. I am offering these proofs in defense.

Mr. Roberts: We object to its relevancy as a valid defense, admitting the facts to be true that the first trial was a mistrial and that both trials were on the same indictment.

The Court: I think you have all that you need on the record on that.

Mr. Battle: Does your Honor rule on the objection?

The Court: Yes; I think the objection is well taken.

Mr. Battle: We respectfully except.

That concludes our proof on Contempt No. 18, and if the Government has no further proof, the proof in that matter will be considered closed.

Owen J. Roberts was then called as a witness in rebuttal on behalf of the United States, and being first duly sworn, testified as follows:

Direct examination:

Mr. Roberts: In view of the statements in the pleadings, the truth or accuracy of which I admitted as Government Counsel, I wish to put on the record what was stated at the bar of the court and which I think is not of record in the court now, that as the records of this court will show, the case of United States versus Sinclair and Fall was originally set by the court for April 2nd, 1928.

On March 22 there came on for hearing a motion for severance made by the Government. Counsel for the defense both objected to that severance and asked for a continuance on the ground that Fall, one of the defendants, was
104 unable physically to attend the trial. Counsel for the Government insisted that that was an additional reason for a severance and not a continuance. Mr. Justice Bailey who heard the applications on March 22, granted the severance, and then stated that he would take up the trial of the case on April 4 instead of April 2. It was agreed that the deposition of Mr. Fall would be taken, if possible, in the meantime. Government counsel waiving notice and co-operating for that purpose. On April 3, Senator Pomerene being on his way back from the West where he had taken Mr. Fall's deposition or had participated in its taking, and I being in Washington preparing for the trial, I was notified by counsel for the defense that an exigency had arisen which would make it impossible for them to go on with the tiral on April 4. Judge Wright who was to participate in the trial for the defense had not arrived back from the West where he went to take Mr. Fall's deposition. Senator Pomerene had not arrived back from the West, but I expected him on the morning of April 4, the day that Justice Bailey had set. Consequently an oral application was made to Mr. Justice Bailey on the morning of Apr[illegible] Senator Pomerene being absent and I being present, fo[illegible] a few additional days' time in order to get Fall's deposition back and in order that Judge Wright could acquaint his colleagues with what was in that deposition preparatory to trial. Mr. Justice Bailey remarked that Good Friday would intervene between the 4th and the 9th and that he would not sit on Good Friday and that he would consequently grant the application to the extent of setting the case for the morning on Monday, April 9.

Mr. Pomerene: In opening your statement you said that the case was originally set. You mean, the second time?

Mr. Roberts: I meant it was set months before the trial, on April 2nd. It had been set before that time.

Cross-examination:

Mr. Battle: There was a motion also made in addi-
105 tion to the motion for severance? There was also a motion made for a continuance?

Mr. Roberts: After we had notified the other side we would sever on account of Fall's illness, they said they would not resist the motion for severance and would move to continue. This motion was made by Mr. Leahy of this bar, and on that application Mr. Justice Bailey on March 22, set the case for trial on the 4th of April. I have no doubt that Mr. Justice Bailey said: "This case has been set for April 2nd for several months. I have now set it for the 4th day of April." On the 3rd day of April Mr. Hoover made a motion for a postponement of the case on some affidavits, but largely on oral application. There is no doubt that a motion was made on the 3rd and there is no question that the case was then set down for the 9th.

Mr. Battle: That is all.

Mr. Roberts: The Government rests in the case.

Mr. Battle: Testimony being closed on both sides, your Honor, I now move for a judgment of this Court determining that the defendant is not guilty of contempt and asking release of his property and dismissal of the proceedings on each and every ground on which the motion was originally made at the beginning of this hearing and on each and every ground on which the motion was renewed at the beginning of the taking of testimony and at the close of the testimony offered on behalf of plaintiff.

The Court: I am not going to pass on the motion at the present moment. My ruling is reserved without prejudice until you have put in No. 16.

Mr. Battle: I will ask that the motion be considered as being made upon each and every ground that was presented.

The Court: I understand.

After the evidence was put in Contempt No. 16, Mr. Battle said: I move, if your Honor please, on behalf of the defendant, that these proceedings be dismissed and
106 that judgment be rendered on behalf of the defendant, finding him not guilty of contempt, and directing the release of his property, and dismissing these proceedings on each and every ground enumerated in the previous motions.

The Court: Your motion is overruled, Mr. Battle, for the dismissal of the whole proceedings now.

Mr. Battle: I respectfully except and ask that an exception be noted to the denial of the motions, on each ground. I note a separate exception on each ground.

Then, for the purpose of the record, your Honor, I object to any judgment being rendered herein the absence of the defendant, to preserve my rights on that point.

Mr. Pomerene: I move for judgment on the pleadings on the evidence as submitted.

The Court: And counsel for the respondent objects to the consideration of the motion in the absence of the defendant.

Mr. Battle: That is correct, your Honor.

The Court: On that ground, of course, your objection is overruled.

Mr. Battle: I except, your Honor.

That objection goes to both proceedings, contempt No. 16 and No. 18.

The Court: Yes.

The Court then proceeded to render its decision saying in its opinion:

"The Court has no difficulty at all in determining that Mr. Blackmer has been guilty of contempt of this Court, and now formally declares and adjudicates Blackmer to be in contempt of this Court under both of the proceedings, No. 16 and No. 18, which have been the subject of our consideration for the last two days."

The Court then proceeded to consider the penalty
107 which should be imposed, saying:

"I think that in No. 16 the penalty that must be imposed is that of $30,000 and costs, and the funds or bonds in custodia legis will be charged with that fine of $30,000 and costs in No. 16; and in No. 18 the penalty is the same."

Mr. Battle: If your Honor please, I respectfully note an exception to the judgment of the Court, and we will note an appeal, your Honor.

It was agreed that a supersedeas bond should be fixed in the sum of $1,000 with a proviso in the bond that nothing in it contained shall release the bonds from the present custody.

And be it remembered that:

The foregoing contains the substance of all the testimony given at the trial of said cause bearing upon the exceptions herein reserved on behalf of defendant, and each and all of the exceptions stated to have been taken by the defendant were so taken, and were duly allowed by the Court, and entered upon the minutes of the Court; and in order that each and all of said exceptions may be preserved and made a part of the record in this cause, this Bill ~~of~~ Exceptions is duly dated, approved, signed and ordered to be made of record in the above entitled cause this 15th day of January, 1930.

F. L. SIDDONS,
Justice.

Approved:

LEO A. ROVER,
United States Attorney.
ATLEE POMERENE,
Special Counsel.
OWEN J. ROBERTS,
Special Counsel.
GEO. GORDON BATTLE,
Attorney for Defendant.

108 [Endorsed:] In the Supreme Court of the District of Columbia. The United States vs. Harry M. Blackmer. In contempt No. 18. Amended bill of exceptions. (Original.) George Gordon Battle, Attorney for Defendant, 37 Wall Street, New York City.

Endorsed on cover: District of Columbia Supreme Court. No. 5132. Harry M. Blackmer, appellant, vs. United States. Court of Appeals, District of Columbia. Filed Jan. 29, 1930. Henry W. Hodges, clerk.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Monday, February 2nd, A. D. 1931.

* * * * * * * *

It is ordered by the Court that, due to the disqualification of Mr. Chief Justice Martin, the Honorable Joseph W. Cox, Associate Justice of the Supreme Court of the District of Columbia, be, and he is hereby, designated to sit as a member of this Court in the hearing and decision of the following cases on its Calendar, namely, Nos. 5131, 5132, and 5171, January Term, 1931.

Charles H. Robb, Josiah A. Van Orsdel, Associate Justices.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Tuesday, February 3rd, A. D. 1931.

* * * * * * * *

No. 5131

HARRY M. BLACKMER, Appellant,

v.

UNITED STATES

and No. 5132

HARRY M. BLACKMER, Appellant,

v.

UNITED STATES

On motion, the Appellant is allowed to file a reply brief herein with leave to Appellee to reply, and the time for argument is enlarged to two hours on each side.

The argument in the above entitled causes was commenced by Mr. Karl C. Schuyler, attorney for Appellant, and was continued by Mr. Atlee Pomerene, attorney for the Appellee.

* * * * * * * *

Wednesday, February 4th, A. D. 1931.

* * * * * * *

No. 5131

HARRY M. BLACKMER, Appellant,

v.

UNITED STATES

and No. 5132

HARRY M. BLACKMER, Appellant,

v.

UNITED STATES

The argument in the above entitled causes was continued by Mr. Atlee Pomerene, attorney for the Appellee, and was concluded by Mr. George Gordon Battle, attorney for the Appellant.

Mr. Chief Justice Martin took no part in the hearing of these cases.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Nos. 5131, 5132

HARRY M. BLACKMER, Appellant,

v.

UNITED STATES

(Before Robb and Van Orsdel, Associate Justices, and Cox, Associate Justice of the Supreme Court of the District of Columbia)

Mr. Justice ROBB delivered the Opinion of the Court:

In No. 5131 appellant, Harry M. Blackmer, was adjudged guilty of contempt of the Supreme Court of the District in failing to respond to a subpœna to appear on October 17, 1927, as a witness on behalf of the United States at the

trial of Harry F. Sinclair and Albert B. Fall in that Court on a criminal charge of having conspired to defraud the United States in violation of Sec. 39 of the Criminal Code.

In No. 5132, a mistrial of the Sinclair-Fall conspiracy case having been declared on November 2, 1927, appellant was again subpœnaed to appear on Monday, April 2, 1928, as a witness on behalf of the United States at the retrial of the case. Again he failed to appear. He was also found guilty of contempt of the Supreme Court of the District because of that failure.

The issuance and service of the subpœnas and the proceedings in each contempt case were under the provisions of the Act of July 3, 1926 (c. 762, 44 Stat. 835, U. S. C., Sup. IV, Tit. 28, Secs. 711-718).

Sec. 1 of that Act provides that whenever letters rogatory shall issue out of any court of the United States, addressed to any court of any foreign country, to take the testimony of any witness, he being a citizen of the United States or domiciled therein, and such witness, having been personally notified, neglects to appear, the court out of which such letters issued may authorize the issuance of a subpœna addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the court at a time and place therein designated.

The remaining sections read as follows:

"Sec. 2. Whenever the attendance at the trial of any criminal action of a witness, being a citizen of the United States or domiciled therein, who is beyond the jurisdiction of the United States, is desired by the Attorney General or any assistant or district attorney acting under him, the judge of the court before which such action is pending, or who is to sit in the trial of the same, may, upon proper showing, order that a subpœna issue, addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the said court at a time and place therein designated.

"Sec. 3. It shall be the duty of any consul of the United States within any country in which such witness may be at the request of the clerk of the court issuing any subpœna

under this Act or at the request of the officer causing such subpœna to be issued, to serve the same personally upon such witness and also to serve any orders to show cause, rules, judgments, or decrees when requested by the court or United States marshal, and to make a return thereof to the court out of which the same issued, first tendering to the witness the amount of his necessary expenses in traveling to and from the place at which the court sits and his attendance thereon, which amount shall be determined by the judge on issuing the order for the subpœna and supplied to the consul making the service.

"Sec. 4. If the witness so served shall neglect or refuse to appear as in such subpœna directed, the court out of which it was issued shall, upon proof being made of the service and default, issue an order directing the witness to appear before the court at a time in such order designated to show cause why he should not be adjudged guilty of contempt and be punished accordingly.

"Sec. 5. Upon issuing such order the court may, upon the giving of security for any damages which the recusing witness may have suffered, should the charge be dismissed (except that no security shall be required of the United States), direct as a part of such order that the property of the recusing witness, at any place within the United States, or so much thereof in value as the court may direct shall be levied upon and seized by the marshal of said court in the manner provided by law or the rule of the court for a levy or seizure under execution, to be held to satisfy any judgment that may be rendered against such witness in the proceeding so instituted.

"Sec. 6. The marshal, having made such levy, shall thereupon forward to the consul of any country where the recusing witness may be a copy of the order to show cause why such witness should not be adjudged guilty of contempt with the request that said consul make service of the same personally upon the recusing witness, and shall cause to be published such order to show cause and for the sequestration of the property of such witness, in some newspaper of general circulation in the district within which the court issuing such order sits, once each week for six consecutive weeks.

"Sec. 7. On the return day of such order or any later day to which the hearing may by the court be continued, proof shall be taken; and if the charge of recusancy against the witness shall be sustained, the court shall adjudge him guilty of contempt and, notwithstanding any limitation upon the power of the court generally to publish for contempt, impose upon him a fine not exceeding $100,000 and direct that the amount thereof, with the costs of the proceeding, be satisfied, unless paid, by a sale of the property of the witness so seized or levied upon, such sale to be conducted upon the notice required and in the manner provided for sales upon execution.

"Sec. 8. Any judgment rendered pursuant to this Act upon service by publication only may be opened for answer within the time and in the manner provided in Section 57 of the Judicial Code."

On May 13, 1925, in the court below, Sinclair and Fall were indicted for conspiracy to defraud the United States. On May 13, 1927, counsel for the United States filed in that court a petition stating that at the trial of the case they desired the attendance of appellant and another; that appellant was a citizen of and then beyond the jurisdiction of the United States; "that your petitioners believe and therefore aver that the attendance of the said persons at the trial of the said cause is vital and important to the United States, because as your petitioners aver, they believe that the said witnesses have knowledge and information with regard to certain important facts which the United States desires to prove in the said cause, and that their testimony as to said facts will be material in connection with the establishment not only of the conspiracy charged between the defendants in the above captioned cause, but in connection with the proof of overt acts done by the defendants pursuant to said conspiracy. More particularly your petitioners believe and therefore aver that the said * * * and H. M. Blackmer can testify to facts concerning the persons who were in the latter part of the year 1921 and during the year 1922 stockholders of the Continental Trading Company, Ltd., a corporation, and with regard to the distribution by that corporation to its stockholders of certain United States 3½ Liberty Loan

Bonds as dividends, certain of which bonds, as your petitioners believe and therefore aver, were subsequently delivered by or on behalf of one of the defendants, Harry F. Sinclair, to the other defendant, Albert B. Fall."

The petition further prayed the issuance of a subpœna addressed to any Consul General or Consul of the United States within the Republic of France, or within any country in which either of the witnesses might be, "commanding such witness to appear before this Court in Criminal Court No. 2, at the City of Washington, D. C., on the 17th day of October, 1927."

This petition was duly verified by Owen J. Roberts, Special Assistant to the Attorney General, and now an Associate Justice of the Supreme Court of the United States. On the same day the court ordered the subpœna to issue, and fixed and determined at $500 the amount to be tendered to each witness "for his necessary expenses in traveling to and from Washington, D. C., and for his attendance at Court." Thereupon a subpœna in regular form was issued, and on May 27, 1927, was served on appellant by George Orr, Consul of the United States at Paris, France; the consul's return reciting that the service was "at the usual residence of the witness * * *, 25 Avenue Montaigue, Paris, France, and in the presence of Consul Raymond Davis and Mr. Henri Gadd, Attorney for the witness. The witness declined to accept the sum of $500 in United States currency tendered him for traveling expenses. The original copy hereof was left in the hands of the witness." On June 7, 1927, another such subpœna was served on appellant by Raymond Davis, Consul of the United States at Paris, who tendered appellant "the sum of $500 currency of the United States of America" which tender likewise was refused.

On November 4, 1927, counsel for the United States presented a petition to the court below for a rule in contempt, setting forth in detail the proceedings culminating in the failure of appellant to appear as a witness. In addition to the order to show cause, it was prayed that the court direct that the property of appellant within the United States of the amount and value of $100,000, or such other amount and value as to the Court might seem proper, be levied upon and seized by the Marshal of the court "and

held to satisfy any judgment that may be rendered against the said H. M. Blackmer in this proceeding."

On November 16, 1927, the court, on consideration of the foregoing petition, issued an order directing appellant to appear before the court on January 6, 1928, to show cause why he should not be adjudged guilty of contempt and punished accordingly, and that the property of appellant to the amount and value of $100,000 be levied upon and seized by the Marshal to satisfy any judgment that might be rendered against appellant in the proceeding. The order directed that the Marshal of the court making the levy forward to the Consuls of the United States at Paris, France, or in any other countries where appellant might be, a copy of the order, with the request that such Consul or Consuls make service of the same personally upon appellant; and, further, that the Marshal should cause the order to be published in the Washington Evening Star once each week for six consecutive weeks, "in accordance with the provisions of Section 6, c. 762, of the Act approved July 3, 1926, 44 Stat. 835."

The Marshal made return that he had executed the order by levying upon and seizing $100,000 in United States First Liberty Loan Bonds at the par value of $100,000, the property of appellant; and George Orr, Consul of the United States at Paris, France, made return that on the 5th day of December 1927, he had "served a true copy of the within order on the within-named Harry M. Blackmer by delivering said true copy to him". After the levy there was a publication once a week for six consecutive weeks in the Washington Evening Star.

In No. 5132 the verified petition for the issuance of a subpœna was filed on January 9, 1928. The court directed the subpœna to issue, commanding appellant to appear on April 2, 1928. The subpœna issued and was served by Consul Orr on the 1st of February, 1928. $500 in currency was again tendered appellant, and was again refused.

On July 6, 1928, counsel for the United States filed a petition for a rule to show cause, setting forth the proceedings culminating in appellant's failure to respond to the subpœna. An order to show cause was issued but was not served. On December 26, 1928, an alias order was issued commanding appellant to show cause, if any he had, why

he should not be adjudged guilty of contempt of court for failing and refusing to obey the subpœna theretofore issued in the case of United States v. Sinclair and Fall. The order further directed the Marshal of the District to make a further levy upon property of appellant in the United States to the value of $100,000. The Marshal levied upon the same property which he had seized in the prior contempt proceeding. The order was served upon appellant personally by Consul Orr on the 21st of January, 1929, at Paris, France. After the levy there was a publication once a week for six consecutive weeks in the Washington Evening Star.

In each case counsel for appellant appeared specially and moved to vacate the order to show cause and proceedings thereunder, alleging the same to be in conflict with the Fourth, Fifth, Sixth, and Eighth Amendments to the Constitution. The motions were overruled. Whereupon, pleas were filed, on which the United States joined issue or demurred. The cases were heard together, and a fine of $30,000, and costs, adjudged in each case, to be satisfied out of the property seized, unless otherwise paid.

Counsel for appellant, both in brief and argument, have displayed a wealth of learning and great industry in the presentation of their very numerous contentions, but, in our view, the controlling question is whether it is Constitutional for Congress to authorize the service of a subpœna upon a citizen of the United States residing abroad. In determining this fundamental question, we should construe the statute, "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." United States v. Jin Fuey Moy, 241 U. S. 394, 401; Baender v. Barnett, 255 U. S. 224, 226; Panama R. R. Co. v. Johnson, 264 U. S. 375, 396; Michaelson v. United States, 266 U. S. 42, 64. In the Sinking-Fund cases, 99 U. S. 700, 718, the Court said:

"Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

Again, in Atkin v. Kansas, 191 U. S. 207, 223, the court said:

"We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution."

That the citizen, wherever he may be, and so long as he sustains that relationship, owes an absolute and permanent allegiance to his government, may not be denied. Carlisle v. United States, 16 Wall. 147, 154. He is entitled to the protection of his government, and in return the government is entitled to his unqualified allegiance. Minor v. Happersett, 21 Wall. 162, 166; Luria v. United States, 231 U. S. 9, 22.

In Rose v. Himely, 4 Cranch 241, 279, Mr. Chief Justice Marshall said:

"It is conceded, that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens."

In The Apollon, 9 Wheat. 362, 370, the court, speaking through Mr. Justice Story, said:

"The laws of no nation can justly extend beyond its own territories, except so far as its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction."

In United States v. Bowman, 260 U. S. 94, it was held that a criminal statute dealing with acts that are directly injurious to the Government and capable of perpetration without regard to particular locality, is to be construed as applicable to citizens of the United States upon the high seas or in a foreign country, though there be no express declaration to that effect; that citizens of the United States while in a foreign country are subject to penal laws passed by the United States to protect itself and its property. In

United States v. Bennett, 232 U. S. 299, it was held that the Government of the United States as a nation by its very nature benefits the citizen and his property wherever found, and that no imaginary barrier shuts that Government off from exerting the powers which inherently belong to it by virtue of its sovereignty. In Cook v. Tait, 265 U. S. 47, it was ruled that Congress has power to tax income received by a citizen of the United States domiciled abroad from property situated abroad.

In Bartue and Duchess of Suffolk's Case, 2 Dyer's Rep. 176, b, 73 Eng. Reprint 383, and in Knowles v. Luce, Moore's Rep. #(K. B.) 109, 72 Eng. Reprint 473, it was held that at common law the sovereign has a right to recall the subject or citizen from abroad and may seize and forfeit all his property if he refuses to return.

We think it logically follows from the foregoing authorities that a citizen of the United States, though residing abroad, is nevertheless amenable to process issuing under a statute requiring him to appear as a witness in a court of the United States, and that, if he receives reasonable notice and reasonable travelling and attendance fees, due process is satisfied. It is inconceivable that a citizen witness may clog the wheels of justice by crossing the international border and that the Government should be powerless to summon him to return and to subject him to a penalty if, without cause, he fails to respond to the summons.

The Act of 1926 makes it the duty of a citizen, residing abroad, to return when wanted as a witness, and prescribes the notice to be served upon him. In serving that notice the consul exercises no sovereign power. His notice is informative and not coercive. Mr. Chief Justice Taft, speaking for the Court in United States v. Bowman, 260 U. S. 94, 102, said:

"Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the government (of the United States) to which they owe allegiance."

So here, it is no offense to the dignity or right of sovereignty of France merely to notify an American citizen residing therein that he is wanted as a witness in a court of the United States. The consul who served the subpœna

was not acting in his consular or diplomatic character, but as a mere messenger of the Government of the United States. The Act might as well have authorized the Court to designate a messenger to serve the notice. Moreover, the record discloses no complaint on the part of France.

But appellant contends that the Act does not provide any valid method of acquiring jurisdiction to render a personal judgment against the defendant and his property; hence, that all proceedings authorized by the Act leading to the judgment against person and property, and all subsequent proceedings, are void as lacking due process.

Contempt proceedings "are sui generis—neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms—and exertions of the power inherent in all courts to enforce obedience, something they must possess in order properly to perform their functions. * * * While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offenses have been regarded as sui generis and not 'criminal prosecutions' within the Sixth Amendment or common understanding." Myers v. United States, 264 U. S. 95, 103, 104.

In Ex parte Grossman, 267 U. S. 87, 117, the court said:

"Contempt proceedings are sui generis because they are not hedged about with all the safeguards provided in the bill of rights for protecting one accused of ordinary crime from the danger of unjust conviction."

In Cooke v. United States, 267 U. S. 517, the court reaffirmed the ruling in Ex parte Terry, 128 U. S. 289, that when a contempt is committed in open court, it may be adjudged and punished summarily upon the court's own knowledge of the facts, without further proof, without issue or trial, and without hearing an explanation of the motives of the offender. The court then said (p. 536):

"When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and argument. The exact form of the procedure in the prosecution of such contempts is not

important. * * * Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation.

In the present case, proof was made that appellant did not respond to either of the subpœnas. Thereupon the court, in each case, issued an order directing appellant to appear at a fixed time to show cause why he should not be adjudged guilty of contempt and punished accordingly; and the order in each case also directed that the property of appellant "within the United States, of the amount and value of $100,000, be levied upon and seized by the Marshal of this Court *and held to satisfy any judgment that may be rendered* against the said Harry M. Blackmer in this proceeding." (Italics ours.)

In No. 5131 the order to show cause did not set forth the basis of the order. In No. 5132 appellant was specifically informed that he should show cause why he should not be adjudged guilty of contempt in neglecting, failing and refusing to obey the subpœna, theretofore issued by the court and served upon him, to appear before the court as a witness in the case of United States v. Harry F. Sinclair and Albert B. Fall. In the circumstances of this case we do not think appellant is in a position to complain because the charge in No. 5131 was not more specific. To determine whether a defendant has been sufficiently informed of the charges against him, the reviewing court may examine the entire record. Schwartz v. United States, 217 F. 966. Mr. Blackmer is a lawyer, was represented by counsel throughout, and the record leaves no room for doubt that he fully understood that the rule to show cause in each case was based upon his failure to respond to the subpœnas.

Moreover, at the trial of the contempt cases, evidence was introduced by counsel for appellant in supposed extenuation of the offense in each case and in mitigation of penalty. This amounted to a general appearance and appellant will not now be permitted to challenge the sufficiency of the rules to show cause.

In each instance property of the value of $100,000 was attached to satisfy any judgment that might be rendered

against appellant. As provided by Sec. 5 of the Act, appellant received personal notice in each instance, and in each instance there was service by publication as required by Sec. 6 of the Act. In each instance, the charge of recusancy against him having been sustained, the court, as required by Sec. 7 of the Act, adjudged him guilty of contempt and imposed the only penalty provided by that section, namely, a fine of not exceeding $100,000—to wit, $30,000 in each instance. These judgments were to be fully satisfied out of the property attached. It is, we think, plain that there has been no attempt in these cases to obtain a judgment in personam to be enforced in any other court than the court below or in any other respect than upon the property under the control of that court. The proceedings were quasi in rem, in which class of cases a judgment binds nothing but the property attached. Cooper v. Reynolds, 10 Wall 308; Pennoyer v. Neff, 95 U. S. 714, 730. The fact that Congress theretofore had not authorized such a procedure does not militate against the existence of the power to do so. In Big Vein Coal Co. v. Read, 229 U. S. 31, it was ruled that a Circuit Court of the United States has no jurisdiction to issue an order of attachment in a case where no personal service can be had upon the defendant and where there has been no personal appearance in the action, but the court was careful to say: "If Congress had intended any such radical change, it would have been easy to have made provision for that purpose, and doubtless a method of service by publication in such cases would have been provided."

It is not necessary, therefore, to determine whether Sec. 4 of the Act authorizes a personal judgment in the absence of the recusing witness nor whether the prescribed procedure would constitute due process. We are convinced that Congress would have authorized the procedure under Sec. 5 irrespective of Sec. 4. Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601, 635-636; El Paso & N. E. Ry. v. Gutierrez, 215 U. S. 87, 96; Southwestern Oil Co. v. Texas, 217 U. S. 114, 121.

Appellant advances the contention that the search and seizure of property authorized by the Act is unreasonable and violative of the Fourth Amendment. Reasonably construed, the Act does not contemplate or authorize an un-

reasonable search and seizure, and the records in these cases fail to disclose such a search and seizure. The Marshal's return in each case recites that he executed the order of the court "by levying upon and seizing One Hundred Thousand ($100,000) Dollars in United States First Liberty Loan Bonds at the par value of $100,000, the property of the said defendant, Harry M. Blackmer."

It further is contended that "by excluding defendants in criminal prosecutions from the right to extra-territorial subpœnas the Act violates that part of the Sixth Amendment of the United States Constitution providing that the accused in such actions shall have compulsory process for obtaining witnesses in his favor."

Sec. 1 of the Act provides that if a citizen of the United States while abroad refuses to respond to letters rogatory, the court out of which such letters issued may authorize the issuance of a subpœna for such citizen to appear before the court at the time and place designated. This section is available to either party in a civil action and to the defendant in a criminal action or in a contempt proceeding. Because of the provisions of the Sixth Amendment that the accused is entitled to be confronted with the witnesses against him, the United States is not entitled to letters rogatory in a criminal case. The defendant in such a case may have such letters and, if the witness refuses to respond, may have a subpœna. He has, therefore, substantially equal process to that accorded the United States. This is all that is required. In United States v. Heinze, 218 U. S. 532, the contention was advanced that the defendant in a criminal case was denied due process and equal protection of the law because he was not accorded rights to appeal equal to those accorded the prosecution. The contention was rejected.

In Blair v. United States, 250 U. S. 273, the plaintiffs in error had been adjudged guilty of contempt because of their refusal to obey a court order directing them to answer certain questions before a Federal grand jury, and committed to the custody of the Marshal until they should comply. On their refusal to answer the questions, the grand jury made a written presentment of the facts to the District Court, with the prayer that they might be dealt with as contumacious witnesses. Counsel for the witnesses

contended that the Corrupt Practices Act of June 25, 1910 (36 Stat. 822), was unconstitutional and void, and, hence, that the grand jury lacked authority to investigate supposed violations of that Act. In affirming the judgment, Mr. Justice Pitney for the Supreme Court said:

"In truth it is in the ordinary case no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not."

So here, it was the duty of appellant to respond to the summons, and it was not his function but that of the defendants in the criminal case to challenge the validity of the proceedings.

It is further contended that the Act violates the guarantee of due process under the Fifth Amendment "because it is arbitrary, capricious, unreasonable, indefinite and uncertain": first, because it makes "ownership of 'non-offending' property condition precedent to guilt of a criminal offense." Sec. 5, as we have already ruled, authorizes the quasi in rem proceeding whenever property of the recusing witness may be attached, but the contumacy of the witness depends not upon the ownership of property but upon the question whether he, without cause, failed to respond to the witness subpœna. Knowing that so long as the recusing witness remained abroad he could not be subjected to punishment, except through a fine levied upon his property located here, we think the provision was within the power of classification of Congress. As the court below observed:

"The provision of the statute for the sequestration of the property of such a witness within the territorial jurisdiction of the United States is analagous to the sequestration of property, not infrequently made, of a party litigant who otherwise, by the simple expedient of remaining out of the territorial jurisdiction of the court, may defeat the purposes of a suit or action."

Sec. 5 of the Act authorized the court to direct "that the property of the recusing witness, at any place within the United States, or so much thereof in value as the court may direct shall be levied upon and seized * * *, to be

held to satisfy any judgment that may be rendered against such witness in the proceeding so instituted." Under Sec. 7, the limit of the fine is $100,000. It must be assumed, therefore, that the court, in the exercise of a reasonable discretion, would not direct the attachment of more property than necessary to liquidate the authorized fine. The circumstances of each case also would be an element in the determination by the court of the amount of the property to be attached.

Since personal service was had in the present cases, it is unnecessary to consider Sec. 8.

Appellant further contends that the subpœnas directed to him were not issued upon proper showing, and, hence, violative of due process under the Fifth Amendment. Sec. 1 of the Act authorizes the court to issue a subpœna "upon proper showing" in cases where a witness had neglected to respond to letters rogatory. Sec. 2 provides that whenever the attendance, at the trial of any criminal action, of a witness who is beyond the jurisdiction of the United States, "is desired by the Attorney General or any assistant or district attorney acting under him, the judge of the court before which such action is pending, or who is to sit in the trial of the same, may, upon proper showing, order that a subpœna issue, * * *." It may be observed at the outset that it is for the court, in the exercise of a sound discretion, to determine whether a proper showing has been made, and not the recusing witness. That a proper showing was made in the present case is, we think, too plain to admit of doubt.

The Act of 1926 contains no requirement that the subpœna contain notice that it was issued under authority of the Act. It is to be presumed, therefore, that the ordinary form of subpœna was to be issued. Moreover, the records in these cases disclose that appellant had advised with counsel and was thoroughly familiar with the provisions of the Act. He not only was chargeable with knowledge of the Act, but was possessed of actual knowledge of the Act.

Appellant further contends that "the tenders of witness fees were insufficient and appellant was not bound to obey the subpœnas." In each instance the court, in conformity with the statute, fixed the amount to be tendered to appellant "for his necessary expenses in travelling to and from Washington, D. C., and for his attendance at Court," at

$500. In serving the first subpœna, Consul Orr tendered the $500 "for travelling expenses"; but in serving the second subpœna for attendance at the same trial, Consul Davis simply tendered $500; and Consul Orr in serving the subpœna in No. 5132 tendered $500 without any limitation. Appellant in each instance, so far as the records disclose, refused each tender without asking any questions and without any protest. There is no evidence that the amounts of the tenders were insufficient. If appellant did not understand what they were for, he was lacking in intelligence. Being a lawyer and actually familiar with the provisions of the Act, it will be presumed that he knew the purpose and scope of the tenders.

The contention is made that there was an abandonment of the seizure in No. 5131 by the seizure of the same property in No. 5132, and authorities cited to the effect that if in a particular action an alias order is issued before property taken under the original writ is disposed of, the alias order destroys the lien acquired by the original writ. These cases are not in point, for here there were two different seizures in two different cases upon two different causes of action. The two different levies in these cases are not inconsistent with an intent on the part of the Government to maintain each.

In No. 5132 appellant was subpœnaed to appear on April 2, 1928, "and not depart the court without leave of the court or district attorney." The trial was continued and did not commence until April 9, 1928, when appellant was called as a witness and did not respond. He now contends that he was not subpœnaed to attend the court on April 9, 1928, and, hence, that all proceedings in No. 5132 under his alleged neglect and refusal to appear as a witness are null and void. The record shows that the Sinclair-Fall case was set for re-trial on April 2, 1928. For cause shown, the trial court extended the time for commencement to April 4th and again until April 9th, 1928. Had appellant obeyed the subpœna and presented himself on April 2, 1928, as required, he would have learned of the continuance and would not have been given leave to depart by either the court or the district attorney. As the court below observed, "What happened on April 2nd in the way of continuing the hearing until a later date was none of his concern."

Finally, appellant contends that "the fines adjudged in these cases, totalling the sum of $60,000 ($30,000 in each

case) are so grossly excessive as to amount to deprivation of property without the due process of law guaranteed by the Fifth Amendment."

When appellant was called as a witness on October 17, 1927, his counsel appeared and attempted to explain why he was not present. In their brief they state that it was desired to give assurance that appellant had no contempt for the court, nor for the judge thereof, nor for the valid laws of the United States; that appellant, in good faith, believed and had been advised that the law and procedure thereunder violated his constitutional rights as a citizen.

In support of appellant's motions to vacate the orders to show cause, his counsel filed appellant's affidavit, in which appellant stated "that in the year 1924 he left the City of Denver, State of Colorado, United States of America, resigning his position as Chairman of the Board of Directors of the Midwest Refining Company, and retired from business, taking up his residence at Hotel Plaza Athenee, in the City of Paris, France (although retaining his American citizenship); that thereafter and in the year 1926 he formed the intention of residing permanently abroad and then disposed of his former home in the said City of Denver, since which time he has at all times resided abroad, spending his time in England, in France and elsewhere."

At the trial of the contempt cases, George Gordon Battle, Esquire, of New York City, and Eugene D. Millikin, Esquire, of Denver, Colorado, appeared as counsel for appellant. During the course of the trial, Mr. Battle was called as a witness on behalf of the defendant (appellant here). He testified that he was in Paris, France, in the summer of 1927, just after the subpœnas had been served on Mr. Blackmer (dates of service: May 27, 1927, and June 7, 1927), and discussed with him the constitutionality and procedure under the Walsh Act (Act of July 3, 1926, 44 Stat. 835) and as to what his action should be with respect to responding to the subpœna; that the witness informed Blackmer that he (the witness) had carefully considered the question of the constitutionality of the Act and had obtained the opinions of several prominent lawyers concerning it; that he "advised Mr. Blackmer that the Act was unconstitutional, that it was void, and

that the whole proceedings under it would be void." On cross-examination, the witness stated that he was Blackmer's counsel "considerably before this subpœna went out. I knew that letters rogatory were issued to take his testimony in the suit in Wyoming." Over objection of counsel for appellant, the witness was questioned concerning the suit of United States v. Mammoth Oil Co. (5 F. (2d) 330; 14 F. (2d) 705; 275 U. S. 13), in which the United States was seeking civil remedy on the same question on which it sought criminal remedy in the conspiracy case in which appellant was subpœnaed. Mr. Battle testified: "As Mr. Blackmer's counsel I am familiar with the fact that in the bill of the Mammoth Oil Company Case, Mr. Sinclair was charged amongst other things, with conspiracy with Mr. Fall, as in the criminal cases; that there was an application made to the United States District Judge at Cheyenne to take the testimony of Mr. Blackmer on the issues, amongst others, of conspiracy to defraud the United States; that letters rogatory were issued by Judge Kennedy, of that court, addressed to a French Court to examine Mr. Blackmer before them on certain questions propounded by the Government touching this alleged conspiracy;" that when letters rogatory were exposed to appellant and the questions propounded to him by the French judge of the French Court, he (appellant) answered to his name, gave his age, and refused to answer any further questions. The witness was asked whether appellant then knew of the provisions of the Act, and he replied, "I told him the provisions of the Act." The witness further testified:

"I would also say in regard to the letters rogatory that Mr. Blackmer depended upon the opinion of French counsel that he was not under any obligation to answer the questions addressed to him in the French court."

The purpose of the testimony of Mr. Battle that appellant was advised by eminent counsel that the Act was unconstitutional was in supposed extenuation of the offense and in mitigation of the penalty. Sinclair v. United States, 279 U. S. 749, 766. Blackmer's good faith, therefore, was involved. Tornanses v. Melsing, 106 F. 755. As bearing upon his good faith, his attitude with respect to the letters

rogatory in the civil suit was important. It is clearly recognized that the giving of testimony is a public duty. Blair v. United States, 250 U. S. 273, 281.

It is further urged that the failure to respond to the subpœna at the re-trial (R., No. 5132) resulted in no inconvenience to the Government because other testimony became available for use at that trial, and, hence, that appellant's conduct was not disrespectful to the court. It ill becomes appellant, after he has persistently manifested an intent to evade his public duty and embarrass the Government, to say that his conduct was not contemptuous of the court because other evidence was available to the Government. The Government prevailed in the civil suit, notwithstanding his refusal to testify (Mammoth Oil Co. v. United States, 275 U. S. 13), but it did not prevail in the criminal case. The result might have been different had appellant fulfilled his duty.

Under the provisions of the statute, the court might have fixed the fine at $100,000 in each case. It was fixed at $30,000 in each case. Mr. Blackmer left the United States in 1924, when it must have been apparent to him that his testimony might and probably would be sought by the Government in the attempt to uncover the fraud and corruption culminating in the oil and gas lease to the Mammoth Oil Company. Later, letters rogatory were issued, but Blackmer refused to testify and could not be coerced. His hostile attitude and his disinclination to fulfill his public duty became apparent. When his testimony was sought in the criminal case involving substantially the same facts, he refused to respond to the subpœnas, and attemped to justify his conduct by challenging the constitutionality of the Act under which the subpœnas were issued. He knew, or should have known, that it was as much his patriotic duty to yield his testimony in the Government's efforts to uncover fraud and punish the guilty as it would be his duty to bear arms in defense of his country. Indeed, the injury to the Government resulting from the refusal of a material witness to testify might be infinitely greater than that resulting from his refusal to bear arms, and, yet, the citizen "may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convic-

tions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense." Jacobson v. Massachusetts, 197 U. S. 11, 29.

Doubtless Congress considered the possible serious consequences which might result from the refusal of a witness to respond to a subpœna when it authorized a penalty of $100,000 for each offense. It had a right to take into consideration that ordinarily only a man of means could afford the luxury of abandoning his business and practically expatriating himself by taking up his residence abroad. A small fine in such circumstances would have no deterrent effect. In the present cases, the records indicate that Mr. Blackmer is a man of extensive business interests and large means. Considering the records as a whole, we are clearly of the view that the trial court in assessing the fines did not abuse its discretion.

Other contentions have not been overlooked, but they have not been found of sufficient merit to warrant discussion.

The judgments are affirmed.

Affirmed.

Endorsed: Nos. 5131 and 5132. Harry M. Blackmer, Appellant, v. United States. Opinion of the Court per Mr. Justice Robb. Court of Appeals, District of Columbia. Filed April 6, 1931. Henry W. Hodges, Clerk.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, APRIL TERM, 1931

Monday, April 6th, A. D. 1931.

No. 5132

HARRY M. BLACKMER, Appellant,

v.

UNITED STATES

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia,

and was argued by counsel. On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed.

Per Mr. Justice Robb, April 6, 1931.

Mr. Justice Cox, of the Supreme Court, D. C., sat in this case in the place of Mr. Chief Justice Martin.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 106, inclusive, constitute a true copy of the transcript of Record and proceedings of the said Court of Appeals in the case of Harry M. Blackmer, Appellant, vs. United States, No. 5132, April Term, 1931, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Court of Appeals, at the City of Washington, this Fifteenth day of May, A. D. 1931.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. (Seal Court of Appeals, District of Columbia.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 19, 1931

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1434)

Office Supreme Court, U.
FILED
JUL 3 1931
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM—1931.

No. 200 No. 201

HARRY M. BLACKMER,
Petitioner,

v.

UNITED STATES,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

GEORGE GORDON BATTLE,
37 Wall Street,
New York City.

KARL C. SCHUYLER
and
EUGENE D. MILLIKIN,
First National Bank Bldg.,
Denver, Colorado.

FREDERICK DE C. FAUST,
CHARLES F. WILSON,
Metropolitan Bank Bldg.,
Washington, D. C.

Counsel for Petitioner.

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Supreme Court of the United States,

OCTOBER TERM—1931.

No..... No.....

HARRY M. BLACKMER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRITS OF CERTIORARI.

To the Honorable, Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Preliminary.

In 1924, petitioner retired from business, left the United States, took up his residence in the City of Paris, Republic of France, and has not since returned to this country (R., 5131, pp. 18, 19; R., 5132, pp. 16-19). There is no allegation in the Record that the testimony desired from petitioner was ever given to any grand jury, or to any attorney for the Government, or was other than conjectured.

In May, 1925, Harry F. Sinclair, and Albert B. Fall were indicted by a Federal Grand Jury for the District of Columbia for conspiracy to defraud the United States,

were both thereafter arrested, and the case was docketed in the Supreme Court of the District of Columbia as Criminal No. 43324 (R., 5131, pp. 1-3; R., 5132, pp. 1-3).

History of the Act—Its Special Purpose.

From the report of the Committee on Public Lands and Surveys in charge of the Teapot Dome inquiry (Cong. Rec., May 29, 1928, page 10,520):

> "Blackmer (petitioner herein) and * * * (another citizen) were and are still abroad, subject to a penalty of one hundred thousand dollars for failing to respond to a subpoena to attend the criminal trial in the District, a law to that effect having been enacted to enforce their appearance." (Our parentheses.)

From the statements of the Senate and House Committee Chairmen in charge of the bill while under debate in Congress:

> In the Senate:
>
> "Mr. Walsh: Mr. President, it will be recalled that the affairs of the Continental Trading Co. became the subject of inquiry in the suit brought by the Government of the United States against the Sinclair Co. in the State of Wyoming. The testimony of certain witnesses was desired, but they found it convenient to be in Europe at the time. * * * I introduce the bill, which I send to the desk, in order to meet that situation and ask that it may be read" (Cong. Rec., Vol. 67, part 1, p. 613).
>
> In the House:
>
> "Mr. Graham: * * * I may say to the House that it is no secret that the primary object of this measure is to bring back from France two witnesses who are regarded as very material and important witnesses in the prosecution of the cases, civil and criminal, which arose out of the Teapot Dome oil scandal. (Applause.) * * * (Cong. Record, Vol. 67, No. 172, pp. 12,816-7).

The Act.

On July 3, 1926, the Act of Congress in question was approved (Act of July 3, 1926, c. 762; U. S. C. Tit. 28, Secs. 711-718 inc.). It is hereinafter referred to as "the Act".

Section 1 of the Act applies to civil cases, and provides that whenever a citizen of the United States, or a person domiciled therein, shall not appear to answer, or having appeared, shall not answer, any question propounded to him under letters rogatory issued out of a United States court, such court may order the issuance of a subpoena for such witness to be sent to a United States Consul within the country where the desired witness may be. By later sections of the Act it appears that the service, the punishment for disobeying, etc., are the same as in the case of a *Section 2* subpoena issuing out of criminal actions (Act, Sec. 3, *et seq.*).

Section 2 authorizes United States courts, in criminal cases, upon "proper showing" of the Attorney General or any assistant or district attorney acting under him, to issue and to have United States Consuls serve witness-subpoenas (after first tendering necessary travel and attendance expenses) upon citizens of the United States, or persons domiciled therein, who are "beyond the jurisdiction of the United States."

The right to such extra-territorial subpoenas is withheld from the defendant in criminal actions (Act., Sec. 2). There is no requirement that the subpoenas shall carry notice that they issued under authority of the Act (see Act).

Section 4 provides that if the command of the subpoena should not be obeyed, the Court shall issue an Order to Show Cause directing the disobedient person to

appear before such court, at a time in such order designated, to show cause why he should not be adjudged guilty of contempt and be punished accordingly (Act, Sec. 4).

As to a disobedient property owner, the Act provides that the Order to Show Cause may direct the unlimited sequestration of his property in the United States which shall be held to satisfy any judgment that may be rendered against him in the proceeding so instituted (Act, Sec. 5). The Act contains no provision for making property "offending", nor does it contain any provision under which the Government could possibly have a money claim against defendant, or a property dispute with him at the time of the sequestration. Nor does the Act attempt to destroy the presumption of innocence (which necessarily carries with it the presumption that there will be no fine to satisfy) prevailing in criminal contempt actions.

Section 6 provides that *after* the marshal has seized and levied upon the property, a copy of the Order to Show Cause shall be forwarded by the marshal to "the Consul of any country" where the disobedient person may be, with the request that the Consul make service of such order personally upon the disobedient person, and the Order to Show Cause (including the Court's direction in such Order for sequestration of the property) shall be published in some newspaper of general circulation in the district of the court issuing such order.

The Act does not require that the Order to Show Cause shall specify or shall be accompanied by a specification of the alleged offense or of the facts constituting the cause of action against the property, [illegible] a description of the property to be sequestered (S[illegible]). If the Consul should be unable to make personal service of the Order to Show Cause, "publication only" is relied upon to support the punitive procedure (Act, Sec. 8).

On the return day of the Order to Show Cause, the trial shall proceed whether or not the property-owning person to whom the order was directed is present, whether or not he waived his presence, whether or not he received actual notice of the offense charged; and if it shall be proved that he did not obey the witness-subpoena, he shall be adjudged guilty of contempt and shall be fined not to exceed $100,000,—the fine, unless paid, to be satisfied out of the sequestrated property (Act, Sec. 7 and 8). *Since the Order to Show Cause does not issue until after the Marshal has seized property, there is no provision in the Act for punishing disobedient non-property owning persons (Act., Sec. 6).*

Where there has been a judgment of guilty of criminal contempt of court, and defendant's property has been ordered sold to pay the fine "on service by publication only", defendant may come in within one year, if he should happen to learn of what has happened, and open the judgment for answer in the manner provided in Section 57 of the Judicial Code, relating to *in rem* actions. It is not clear what bearing the *in rem* questions raised by answer under Section 57 of the Judicial Code could have on the personal judgment of guilty of criminal contempt of court.

A copy of the Act is annexed hereto.

* * * * *

Procedure in 5131.

On May 13, 1927, special counsel herein, and the then District Attorney for the District of Columbia filed a petition with the Supreme Court of the District of Columbia (which for more convenient reference we shall hereinafter refer to as "the trial court") in which they averred that they "believed" that petitioner could testify to certain facts at the trial of the Sinclair-Fall criminal

case which had already been set for trial for October 17, 1927 (R., 5131, pp. 1-3).

On the same date, May 13, 1927, the trial court granted an order directing the issuance of the subpoenas prayed for; directing that they command petitioner to be and appear in Criminal Court No. 2 on October 17, 1927; that the subpoenas be addressed to any Consul of the United States in the Republic of France, or elsewhere, and that the sum of $500 be tendered petitioner for "travelling expenses" and for "attendance" at Court (R., 5131, pp. 3-4).

The resulting subpoenas later served on petitioner were in the traditional form of witness-subpoenas issued in behalf of the Government in criminal cases in United States courts, and contained no reference to the Act in question (R., 5131, pp. 7, 10).

On May 27, 1927, one of the subpoenas was served on petitioner "at his usual residence in Paris, France," by George Orr, a Consul of the United States in that City, and at the time of service Consul Orr tendered petitioner the sum of $500 for "travelling expenses". Nothing was said about "attendance" expenses (R., 5131, p. 8). On June 7, 1927, another such subpoena was served on petitioner at Paris, France, by Raymond Davis, also a Consul of the United States in said City, and at the time of this service Consul Davis tendered petitioner the sum of $500 without any explanation of its purpose (R., 5131, pp. 9-10). Petitioner refused both said tenders (R., 5131, pp. 8-10).

Neither Consul Orr nor Consul Davis informed petitioner that the subpoenas or the tenders were by authority of the Act (R., 5131, pp. 8-10).

The Sinclair-Fall trial commenced on October 17, 1927, and ended as a mistrial on November 2, 1927 (R., 5131, pp. 45, 50, 75).

At the commencement of the mistrial and after petitioner had been called and did not answer, Nathan L.

Miller and George Gordon Battle, Counsel for petitioner, appeared specially in his behalf and stated to Mr. Justice Siddons, presiding, that petitioner did not desire even to appear to flout or be disrespectful of the process of the Court, and attempted to state why petitioner was not present. The explanation was not permitted (R., 5131, pp. 10-11).

Responsive to the petition of Special Counsel herein, *copy of which was not served* on petitioner (R., 5131, pp. 4-7, 12, 13), the trial court on November 16, 1927, issued the Order to Show Cause. Without specifying a single fact constituting an offense, or a cause of action against petitioner's property, the order cited petitioner to appear on a certain date and show cause why he should not be adjudged guilty of contempt and be punished accordingly. The order also directed the seizure of undescribed property of petitioner of the value of $100,000.00, the service on him of a copy of the order, and publication of the order in the Washington Evening Star (R., 5131, pp. 11-12).

On November 19, 1927, the United States Marshal at Washington, D. C., levied upon and seized United States First 3½% Liberty bonds of petitioner of the par value of $100,000 (R., 5131, pp. 12-14). A copy of the Order to Show Cause was subsequently published in the Washington Evening Star (R., 5131, p. 14). It was not published in the Washington Law Reporter as required by Law Rule 19, para. 4, of the Supreme Court of the District of Columbia (R., 5131, pp. 49, 52).

On December 5, 1927, Consul George Orr served a copy of the Order to Show Cause on petitioner at his residence in Paris, France (R., 5131, pp. 12, 13).

Petitioner thereafter appearing specially by his attorneys filed a motion in the trial court to vacate and set aside the Order to Show Cause of November 16, 1927, and all proceedings pursuant thereto on the ground that the trial court did not have jurisdiction over petitioner

or of the proceeding because the Act violated the Fourth, Fifth, Sixth and Eighth amendments of the Constitution of the United States. This motion was made upon the proceedings theretofore had in the matter and upon the affidavit of George Gordon Battle, annexed thereto, which was later supplemented by affidavit of petitioner (R., 5131, pp. 16-19). These affidavits were uncontroverted and were to the effect that petitioner had resided abroad continuously since 1924. The motion to vacate and set aside, after argument, was overruled (R., 5131, pp. 33, 34).

Thereafter, petitioner, under protest and reserving his prior special appearance, filed certain pleas upon which the United States joined issue or demurred (R., 5131, pp. 34-52).

The identical Liberty Bonds of petitioner seized in this case (R., 5131) were, on January 7, 1929, again independently levied upon and seized by the United States Marshal at Washington, D. C., in connection with the proceedings in 5132 (R., 5131; p. 75).

* * * * *

Procedure in 5132.

On January 9, 1928, special counsel herein and the then District Attorney for the District of Columbia filed a petition in the trial court in which they averred that they "believed" that petitioner could testify to certain facts at the retrial of the Sinclair-Fall criminal case which had been set for April 2, 1928 (R., 5132, pp. 1-3).

In response to the petition of January 9, 1928, and on the same date, the trial court directed the issuance of the subpoenas prayed for, directed that they command petitioner to be and appear before said Court in Criminal Court No. 2 thereof on April 2, 1928, and that they be addressed to any Consul of the United States in the Republic of France or elsewhere, and that the sum of

$500 be tendered petitioner for "travelling expenses" and for "attendance" at Court (R., 5132, pp. 3-4).

The resulting subpoena for petitioner was again in the traditional form of witness-subpoenas issued in behalf of the Government in criminal cases in United States courts, and contained no reference to the Act (R., 5132, p. 8).

On February 1, 1928, this subpoena was served on petitioner in Paris, France, by Consul George Orr, and at the time of the service Consul Orr tendered petitioner the sum of $500 without any explanation of its purpose. Petitioner refused the tender.

Consul Orr did not inform petitioner that the subpoena or the tender was by authority of the Special Act in question (R., 5132, p. 9).

The Sinclair-Fall case was not called for trial on April 2, 1928, the date set in the subpoena; and on April 2, 1928 there were no proceedings in the case of any kind. Prior to April 2, 1928, and without notice to petitioner, the trial had been postponed to April 4, 1928, and later to April 9, 1928. Petitioner had received no subpoena or other command to attend the Court on April 4, 1928, or April 9, 1928 (R., 5132, pp. 8, 62-69). At the commencement of the trial on April 9, 1928, petitioner was called and did not answer (R., 5132, pp. 7, 26-27).

Responsive to a petition of July 6, 1928, of Special Counsel herein, *copy of which was not served on petitioner* (R., 5132, p. 14), an Alias Order to Show Cause was issued on December 26, 1928 (R., 5132, pp. 11-12). It cited petitioner to appear on a certain day and show cause why he should not be adjudged guilty of contempt of Court in neglecting, failing and refusing to obey "the subpoena heretofore issued by said Court and served upon him (petitioner) to appear before the Court as a witness in the case of the *United States* v. *Harry F. Sinclair and Albert B. Fall,* Criminal No. 43324, the circumstances of which are very fully set out in said motion

(the petition of July 6, 1928 above referred to) of plaintiff filed herein * * *" (R., 5132, p. 11). (Our parenthesis.)

The subpoena referred to, since petitioner did not receive a copy of the motion (the petition of July 6, 1928), might have been any one of the three subpoenas previously served in connection with the mistrial and retrial of the Sinclair-Fall case. The Alias Order to Show Cause also contained directions respecting the seizure of undescribed property of petitioner, directions for its publication in the Washington Evening Star, and for service of a copy upon petitioner (R., 5132, pp. 11-12).

On January 7, 1929, by virtue of said Alias Order the United States Marshal in Washington, D. C., levied upon and seized and took into his custody United States First 3½% Liberty Bonds of petitioner of the par value of $100,000 (R., 5132, pp. 12-14). These were the same bonds which the Marshal had previously levied upon and seized pursuant to a similar order in 5131, then pending against petitioner and growing out of the Sinclair-Fall mistrial (R., 5132, pp. 30, 32, 33, 41; R., 5131, p. 75).

A copy of the Alias Order to Show Cause was subsequently published in the Washington Evening Star (R., 5132, p. 12). It was not published in the Washington Law Reporter as required by Law Rule 19, para. 4, of the Court below (R., 5132, pp. 30, 33). On January 21, 1929, Consul George Orr served a copy of the Alias Order to Show Cause on petitioner at Paris, France (R., 5132, p. 14).

Petitioner thereafter appearing specially by his attorneys filed a motion in the Court below to vacate and set aside the Alias Order to Show Cause of December 26, 1928, and all proceedings pursuant thereto, on the ground that the Court did not have jurisdiction of petitioner, or of the proceedings, because the Act violated the Fourth, Fifth, Sixth and Eighth amendments of the Constitution of the United States. This motion was made

upon the proceedings theretofore had in the matter and upon the annexed affidavits of George Gordon Battle and of the petitioner. These affidavits were uncontroverted and were to the effect that petitioner had resided abroad continuously since 1924 (R., 5132, pp. 16-19). The motion to vacate and set aside was overruled (R., 5132, p. 21).

Thereafter, appellant, under protest, and reserving prior special appearance, filed certain pleas upon which the United States joined issue or demurred (R., 5132, pp. 21-35).

* * * * * *

Procedure Common to 5131 and 5132.

On September 16 and 17, 1929, a trial and a hearing were had in the Supreme Court of the District of Columbia on the Order to Show Cause of 5131, and the Alias Order to Show Cause in 5132, and the pleadings then before the Court.

At the outset and in both cases, counsel for petitioner objected to any testimony being received in the absence of petitioner, but the objection was overruled and exceptions taken (R., 5131, p. 73; R., 5132, p. 57). In both cases, after the testimony was in, and prior to the decision of the Court, counsel for petitioner objected to judgment in his absence. The objection was overruled and exceptions taken (R., 5131, p. 84; 5132, p. 81).

Petitioner, in both cases, moved for judgment on the pleadings and proceedings on various grounds (R., 5131, pp. 52, 72, 73, 74, 84; R., 5132, pp. 35, 56, 60, 80). These motions were overruled and exceptions taken (R., 5131, pp. 72, 74, 84; R., 5132, pp. 56, 57, 60, 80, 81).

Proceedings were had and rulings made by the Court and exceptions taken and allowed, on behalf of petitioner (R., 5131, pp. 72-86; R., 5132, pp. 56-82).

The Court, in each case, adjudged petitioner guilty of contempt of Court, and directed that he be fined $30,000

and costs (Total $60,000 and costs), to which exceptions were taken (R., 5131, p. 85; R., 5132, p. 81).

By consent a supersedeas bond was fixed in each case in the sum of $1,000, and pending appeal to the Court of Appeals of the District of Columbia, the Liberty Bonds levied upon by the United States Marshal remained *in custodia legis* (R., 5131, p. 85; R., 5132, p. 81).

Appeals to the Court of Appeals of the District of Columbia from the judgments of the trial court in each case were perfected by petitioner and were docketed in that court as No. 5131, and No. 5132.

Both cases were heard by the Court of Appeals of the District of Columbia on February 3d and 4th, 1931, and judgments were entered by that court on April 6th, 1931, affirming the decrees and judgments in both cases of the Supreme Court of the District of Columbia (R., 5131, pp. 107-108; R., 5132, pp. 103-104).

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS.

1. The constitutionality of the Act has never been passed on by this court.

2. The Act is without precedent in that:

(a) In the absence of and without contemplating covering treaties, it authorizes the service of process of Federal Courts "beyond the jurisdiction of the United States" on United States citizens, and on aliens abroad who are domiciled in the United States, and makes it a criminal offense to disobey subpoenas so served;

(b) It authorizes *quasi in rem* procedure (attachment of property and publication) to acquire jurisdiction for Federal Courts to try an issue *in personam*—the issue of "recusancy",—and to render a judgment *in personam*—guilty or not guilty of criminal contempt of court;

(c) It authorizes trial and judgment of a criminal offense—criminal contempt of court—in the entire absence of the accused and without waiver of his presence, and, in some cases, without actual notice to him of his offense or of the claim against his sequestered property, "on publication only";

(d) It authorizes attachment of property to secure a possible fine in a future proceeding where the presumption of innocence obtains, and which does not involve the trial of a money claim or questions of "offending" property;

(e) It makes the ownership of "non-offending" property a condition precedent to punishment for a personal criminal offense—criminal contempt of

court—and without limiting the operation of the Act to property owners.

3. The law of these cases, dealing with basic conceptions of jurisdiction, and other first principles, is of the greatest importance, and should be finally settled to avoid confusion and uncertainty.

4. The Court of Appeals of the District of Columbia decided questions of general importance, and questions of substance relating to the construction and application of the Constitution, and of a statute of the United States (the Act), which have not been, but should be settled by this court, and that court did not give proper effect to applicable decisions of this court, in the following respects:

(a) In holding that under the authority of the Act, but without the authority of a treaty, a witness-subpoena, issued by a federal court, is valid although served in France (or in any other sovereign foreign nation), by a United States Consul of that country, upon a citizen of the United States, and that due process under the Fifth Amendment of the Constitution is not thereby violated. (R., 5131, pp. 96, 107-108; R., 5132, pp. 92, 103-104).

(b) In holding that the proceedings authorized by the Act occurring after the failure of the desired witness to obey the subpoena are *quasi in rem*, and that the judgment of contempt of court binds nothing but the property sequestered to satisfy the fine, and that due process under the Fifth Amendment of the Constitution is not thereby violated. (R., 5131, pp. 99, 107-108; R., 5132, pp. 95, 103-104).

(c) In holding that when reasonably construed, the Act does not contemplate or authorize an unreasonable search and seizure of property in vio-

lation of the Fourth Amendment of the Constitution. (R., 5131, pp. 100, 107-108; R., 5132, pp. 96, 103-104).

(d) In holding that the Act does not deny to defendants in criminal prosecutions the right to extra-territorial subpoenas, and hence the Act does not violate that part of the Sixth Amendment of the Constitution providing that the accused in such cases shall have compulsory process for obtaining witnesses in his favor, and in holding that petitioner had no right to raise the point. (R., 5131, pp. 100, 107-108; R., 5132, pp. 96, 103-104).

(e) In holding that the Act is not arbitrary, capricious, unreasonable, indefinite and uncertain, and therefore does not violate the guaranty of due process under the Fifth Amendment of the Constitution (R., 5131, pp. 101, 107-108; R., 5132, pp. 97, 103-104).

5. In failing to pass upon the contention of petitioner (R., 5131, pp. 99, 107-108; R., 5132, pp. 95, 103-104) that the provisions of the Act for hearing and judgment in the entire absence of the accused, who has not waived his presence, violate due process under the Fifth Amendment of the Constitution, the Court of Appeals of the District of Columbia failed to give proper effect to applicable decisions of this court.

6. In failing to pass upon the contention of petitioner that the Act does not require actual or any other notice to defendant of the offense or of the facts constituting the Government's claim against defendant's property, and hence violates the guaranty of due process under the Fifth Amendment of the Constitution (R., 5131, pp. 67, 68; assignments Nos. 1, 2, 5, 7; R., 5132, pp. 51-52, assignments Nos. 1, 2, 4, 11), the Court of Ap-

peals of the District of Columbia failed to give proper effect to applicable decisions of this court.

7. In holding that under the authority of the Act, but without the authority of a covering treaty, witness-subpoenas, and orders to show cause, issued by a federal court may be served validly in France (or in any other sovereign foreign nation) by a United States Consul in that country (R., 5131, pp. 96, 107-108; R., 5132, pp. 92, 103-104), the Court of Appeals of the District of Columbia decided a question of general importance and substance relating to the construction and application of the consular treaties between the United States and France and between the United States and all other nations, and did not give proper effect to applicable decisions of this court.

* * * * * *

We save the following procedural points with the thought and respectful suggestion that when an act is confessedly special, is designed to reach one or two selected citizens, and is passed in a period of national excitement, this court will serve the interests of justice by reviewing whether such an act has been fairly applied to those on whom it was specially designed to operate.

8. The Court of Appeals of the District of Columbia decided questions of general importance, questions of substance relating to the construction and application of the Constitution, and of a statute of the United States (the Act), which have not been, but should be settled by this court, and that court did not give proper effect to applicable decisions of this court, in the following respects:

(a) in holding that the subpoenas directed to petitioner were issued upon "proper showing" as required by *Section 2* of the Act (R., 5131, pp. 102, 107-108; R., 5132, pp. 98, 103-104);

(b) in holding that the Act does not and need not require the subpoenas to contain notice that they issued under the authority of the Act (R., 5131, pp. 102, 107-108; R., 5132, pp. 98, 103-104);

(c) in holding that petitioner received notice of the alleged offense and of the claim against his property, and that the introduction at the trials, by his counsel, of evidence in extenuation and mitigation amounted to a general appearance and deprived petitioner of the right to challenge the sufficiency of the notice. (R., 5131, pp. 98, 107-108; R., 5132, pp. 94, 103-104);

(d) in holding that the seizure in 5132 of the same property which had already been seized in 5131 did not work an abandonment of the first seizure (R., 5131, pp. 103, 107-108; R., 5132, pp. 99, 103-104);

(e) in holding that the subpoena in 5132 commanding the appearance of petitioner on April 2, 1928, was a valid command to appear on April 9, 1928, there having been no proceedings on April 2, 1928 (R., 5131, pp. 103, 107-108; R., 5132, pp. 99, 103-104)—and that due process under the Fifth Amendment of the Constitution was not violated in any of the foregoing matters.

WHEREFORE, your petitioner respectfully prays that writs of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals of the District of Columbia, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, full and complete transcripts of the records and all proceedings in these cases, numbered and entitled on the docket of said Court of Appeals, No. 5131 and No. 5132, Harry M. Blackmer, appellant, *vs.* United States, appellee, and that

the said causes be certified to this Honorable Court for determination by it with like effect as if the causes had been brought to this Honorable Court by unrestricted writ of error or appeal, and that the judgments therein of the said Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

HARRY M. BLACKMER,

By: GEORGE GORDON BATTLE,
KARL C. SCHUYLER,
EUGENE D. MILLIKIN,
FREDERICK DE C. FAUST,
CHARLES F. WILSON,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I.

The Opinions of the Court Below.

The opinion of the Court of Appeals of the District of Columbia has not been reported. It is dated April 6, 1931, and is copied in the record. (R., 5131, pp. 88-107; R., 5132, pp. 84-103).

II.

Jurisdiction.

1. Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938 (U. S. C. Tit. 28, Sec. 347).

2. The date of the judgments to be reviewed is April 6, 1931. (R., 5131, pp. 107-108; R., 5132, pp. 103-104).

III.

Statement of the Case.

A full statement of the case has been given under A in the Petition, and in the interest of brevity, the statement is not repeated at this point.

IV.

Specification of Errors.

1. The Court of Appeals of the District of Columbia erred in finding and holding that under the authority of the Act, but without the authority of a treaty, a witness-

subpoena, issued by a federal court, is valid although served in France (or in any other sovereign foreign nation), by a United States consul of that country, upon a citizen of the United States, and that due process under the Fifth Amendment of the Constitution is not thereby violated. (R., 5131, pp. 96, 107-108; R., 5132, pp. 92, 103-104).

2. The Court of Appeals of the District of Columbia erred in finding and holding that the proceedings authorized by the Act occurring after the failure of the desired witness to obey the subpoena are *quasi in rem*, and that the judgment of contempt of court binds nothing but the property sequestered to satisfy the fine, and that due process under the Fifth Amendment of the Constitution is not violated. (R., 5131, pp. 99, 107-108; R., 5132, pp. 95, 103-104).

3. The Court of Appeals of the District of Columbia erred in finding and holding that when reasonably construed the Act does not contemplate or authorize an unreasonable search and seizure of property in violation of the Fourth Amendment of the Constitution. (R., 5131, pp. 100, 107-108; R., 5132, pp. 96, 103-104).

4. The Court of Appeals of the District of Columbia erred in finding and holding that the Act does not deny to defendants in criminal prosecutions the right to extra-territorial subpoenas, and hence the Act does not violate that part of the Sixth Amendment of the Constitution providing that the accused in such cases shall have compulsory process for obtaining witnesses in his favor, and in holding that petitioner had no right to raise the point. (R., 5131, pp. 100, 107-108; R., 5132, pp. 96, 103-104).

5. The Court of Appeals of the District of Columbia erred in finding and holding that the Act is not arbitrary, capricious, unreasonable, indefinite and uncertain, and therefore does not violate due process under the Fifth Amendment of the Constitution. (R., 5131, pp. 101, 107-108; R., 5132, pp. 97, 103-104).

6. The Court of Appeals of the District of Columbia erred in failing to find and hold that the provisions of the Act for hearing and judgment in the entire absence of the accused, who has not waived his presence, violate due process under the Fifth Amendment of the Constitution. (R., 5131, pp. 99, 107-108; R., 5132, pp. 75, 103-104).

7. The Court of Appeals of the District of Columbia erred in failing to find and hold that the Act does not require actual or any other notice to defendant of the offense or of the facts constituting the Government's claim against defendant's property, and hence violates due process under the Fifth Amendment of the Constitution. (R., 5131, pp. 67, 68, assignments Nos. 1, 2, 5, 7; R., 5132, pp. 51-52, assignments Nos. 1, 2, 4, 11).

8. The Court of Appeals of the District of Columbia erred in finding and holding that under the authority of the Act, but without the authority of a covering treaty, witness-subpoenas (and orders to show cause), issued by a federal court, may be served validly in France (or in any other sovereign foreign nation) by a United States consul of that country without violating due process under the Fifth Amendment of the Constitution. (R., 5131, pp. 96, 107-108; R., 5132, pp. 92, 103-104).

9. The Court of Appeals of the District of Columbia erred in finding and holding that the subpoenas directed to petitioner were issued upon "proper showing" as required by *Section 2* of the Act (R., 5131, pp. 102, 107-108; R., 5132, pp. 98, 103-104); that the Act does not and need not require the subpoenas to contain notice that they issued under the authority of the Act (R., 5131, pp. 102, 107-108; R., 5132, pp. 98, 103-104); that petitioner received notice of the alleged offense and of the claims against his property, and that the introduction at the trials by his counsel of evidence in extenuation and mitigation amounted to a general appearance and deprived petitioner of the right to challenge the sufficiency of the notices (R., 5131, pp. 98, 107-108; R., 5132, pp. 94, 103-104); that the seizure in 5132 of the same property which had already been seized in 5131 did not work an abandonment of the first seizure (R., 5131, pp. 103, 107-108; R., 5132, pp. 99, 103-104); that a subpoena under the Act commanding the appearance of petitioner on April 2, 1928, was a valid command to appear on April 9, 1928, there having been no proceedings on April 2, 1928, (R., 5131, pp. 106, 107-108; R., 5132, pp. 99, 103-104),—and that due process under the Fifth Amendment of the Constitution was not violated in any of the foregoing matters.

V.

ARGUMENT.

Summary of Argument.

POINT A. The provision of the Act authorizing service of a witness-subpoena "beyond the jurisdiction of the United States" is null and void and violates due process under the Fifth Amendment of the Constitution. Congress has no power to authorize United States Consuls to serve process except as permitted by treaty.

POINT B. The Act does not provide a valid method of acquiring judicial jurisdiction to render personal judgment against defendant and judgment against his property, hence all proceedings authorized by the Act leading to judgment against the person and property of defendant, the judgment itself and all subsequent proceedings authorized by it are void and violate due process under the Fifth Amendment of the Constitution.

POINT C. The Act does not require actual or any other notice to defendant of the offense or of the Government's claim against his property, and hence violates due process under the Fifth Amendment of the Constitution.

POINT D. The search and seizure of property authorized by the Act is an unreasonable search and seizure in violation of the Fourth Amendment.

POINT E. The provisions of the Act for hearing and judgment in the entire absence of the accused and without his consent violate due process under the Fifth Amendment of the Constitution.

POINT F. By excluding defendants in criminal prosecutions from the right to extra-territorial subpoenas, the Act violates that part of the Sixth Amendment of

the Constitution providing that the accused in such actions shall have compulsory process for obtaining witnesses in his favor.

POINT G. The Act violates due process under the Fifth Amendment of the Constitution because it is arbitrary, capricious and unreasonable.

POINT H. The procedure against petitioner violates due process under the Fifth Amendment of the Constitution in each of the following respects, to wit:

(a) The witness-subpoenas directed to petitioner, not having issued upon proper showing, were invalid and therefore all subsequent proceedings based on the invalid witness-subpoenas were likewise invalid; (b) the omission from the subpoenas (not otherwise supplied) of notice that they issued under the Act deprived them of compulsory effect, and, therefore, deprived the court below of jurisdiction to punish failure to obey their commands; (c) petitioner did not receive notice of any offense or of facts constituting the Government's claim against his property; (d) levy and seizure of petitioner's property in 5131 was abandoned by the Government, and, therefore, jurisdiction of the person and property of petitioner was abandoned, and all proceedings in 5131 subsequent to issuance of the order to show c[redacted] are null and void; (e) petitioner was not subpoenaed to attend the trial court on April 9, 1928 to testify on behalf of the United States in the Sinclair-Fall trial (Criminal No. 43324) and hence all proceedings in 5132 against petitioner arising out of his alleged neglect and refusal to appear as a witness in said trial on said date are null and void.

POINT A.

The provision of the Act authorizing service of a witness-subpoena "beyond the jurisdiction of the United States" is null and void and violates due process under the Fifth Amendment of the Constitution. Congress has no power to authorize United States Consuls to serve process except as permitted by treaty.

The subpoena is process. *Robertson* v. *Railroad Labor Board,* 268 U. S. 619, 622. It is a judicial command to appear (Act, Sec. 2); it is an assertion of power. *Michigan Trust Company* v. *Ferry,* 228 U. S. 346, 353. The only subpoenas authorized by the Act are those to be served in a "foreign country" and "beyond the jurisdiction of the United States." (Act, Secs. 1 and 2).

The laws of Congress cannot outreach the Constitution. *Hodgson* v. *Bowerbank,* 5 Cranch 303; *Downs* v. *Bidwell,* 182 U. S. 244; *Dorr* v. *U. S.,* 195 U. S. 138. This nation, under the Constitution, is an equal sovereignty, which (in the absence of covering treaties) cannot exercise power extra-territorially. *The Schooner Exchange* v. *McFaddon,* 7 Cranch 116. The adherence of the United States to the principle of equal sovereignty accords with International Law which holds that the dividing line between sovereignties is a territorial line. *Cooley's Constitutional Limitations* (8th Ed.) Vol. 1, pp. 3, 4.

The prohibition against extra-territorial exercise of judicial power applies to the states of the United States whether the attempted exercise of such power be directed toward a citizen of the state or toward an absent non-resident (alien). *McDonald* v. *Mabee,* 243 U. S. 90 (citizen); *Cooper* v. *Reynolds,* 10 Wall. 308 (citizen), reaffirmed in *Pennoyer* v. *Neff,* 95 U. S. 714; *Galpin* v. *Page,* 18 Wall. 350 (alien); *Minder* v. *Georgia,* 183 U. S. 559

(alien); *Harkness* v. *Hyde*, 98 U. S. 476 (alien); *Wilson* v. *Seligman*, 144 U. S. 41 (alien); *Bischoff* v. *Wethered*, 9 Wall. 812 (alien); *Roller* v. *Holly*, 176 U. S. 398 (alien). See also following "alien" cases: *Freeman* v. *Alderson*, 119 U. S. 185; *Overby* v. *Gordon*, 177 U. S. 214; *Brown* v. *Fletcher's Estate*, 210 U. S. 82; *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346; *Baker* v. *Baker*, 242 U. S. 394.

The prohibition applies to our federal courts—in favor of absent citizens of the United States, whether abroad or absent from a particular district. *Robertson* v. *Railroad Labor Board*, 268 U. S. 619 (Op. by Mr. Justice Brandeis); *Toland* v. *Sprague*, 12 Peters 300 (action under Pennsylvania Foreign Attachment Act and Federal Conformity Act. Defendant, a citizen of the United States, resided at Gibraltar, Spain); *Picquet* v. *Swan*, 5 Mason 35 (C. C. U. S. Mass. Op. by Mr. Justice Story, 1848). (Under Mass. Foreign Attachment Act and Federal Conformity Act. Defendant, a citizen of the United States, resided at Paris.) The prohibition is applied by this nation to other nations (in the absence of treaty) attempting to exercise judicial power in the United States over their own citizens. *Glass* v. *The Sloop Betsey*, 3 Dallas 6. (Attempt by France to exercise admiralty jurisdiction through its consuls over its citizens in the United States). It applies to the Government as well as to private suitors. *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 623, *supra*.

Jurisdiction *in personam* is "*acquired*" either by voluntary appearance, or service on the person within the territorial jurisdiction of the court. *Robertson* v. *Railroad Labor Board*, 268 U. S. 619. See also to same effect—*Pennover* v. *Neff*, 95 U. S. 714; *Boswell* v. *Otis*, 9 How. 346; *In re Johnson*, 167 U. S. 120; *McDonald* v. *Mabee*, 243 U. S. 90; *Herndon* v. *Ridgway*, 17 How. 424; *Michigan Trust Company* v. *Ferry*, 228 U. S. 346; *Baker* v. *Baker*, 242 U. S. 394; *Goldey* v. *Morning News*, 156 U. S. 518; *Insurance Company* v. *Bangs*, 103 U. S. 435; *Gal-*

pin v. *Page,* 18 Wall. 350; *Wilson* v. *Seligman,* 144 U. S. 41.

It follows that extra-territorial service of process, service "beyond the jurisdiction of the United States", is invalid and violates due process. *Pennoyer* v. *Neff,* 95 U. S. 714. The subpoena being invalid, the court is without jurisdiction and the order punishing for contempt is void. *Ex parte Fiske,* 113 U. S. 713. See also *U. S.* v. *Shipp,* 203 U. S. 563; *Ex parte Rowland,* 104 U. S. 604; *In re Sawyer,* 124 U. S. 200.

The court below took the position (R. 5131, p. 95; R. 5132, p. 91) that the duty of allegiance validates the extra-territorial service of process. We respectfully suggest that the duty of "allegiance" exists in the United States,—exists at Cleveland, Ohio, where a citizen of the United States, residing in that city was permitted by this court to disobey the subpoena of a United States court, because it had been served extra-territorially. *Robertson* v. *Railroad Labor Board,* 268 U. S. 619, *supra.* The analogy comes closer when it is noted that Robertson's testimony was wanted by an agency of the government engaged in investigating transportation problems of great importance which were then vexing the nation.

Allegiance as a doctrine to destroy territorial limits on the exercise of power, was squarely presented to and repudiated by this court. *McDonald* v. *Mabee,* 243 U. S. 90 (Op. by Mr. Justice Holmes). The question was whether extra-territorial service of process, under the laws of Texas, was valid to bind Mabee (who was absent from the state with the intention of not returning, but who had not given up his Texas citizenship) to a judgment *in personam.* The position of Mabee was summarized to this court by his counsel, including the late Senator Joseph W. Bailey, as follows:

> "In conclusion we respectfully submit that Mabee, the Defendant in Error here, and the De-

> fendant in the original Cause No. 5468, being a citizen of Texas and resident in Texas, charged with a knowledge of the laws of Texas, submitting himself, his family and his property to the laws of Texas, entitled to the protection of these laws, enjoying the rights, privileges and immunities which they safeguarded, thereby became amenable to such laws and accepted and agreed to their provisions for substituted service of process in each and every respect provided by the Statutes. He was not a citizen of another state and therefore needed no protection against the laws of his own state. Whether absent from the state, his residence therein unknown, or a transient person within the state, he had consented to and could lawfully be served with process by publication which would support a personal judgment against him." (p. 7, Brief for Defendant in Error, Vol. 57, collected briefs.)

To same effect see *Mabee* v. *McDonald*, 107 Tex. 139; 175 S. W. 676.

This court, however, rejected the doctrine and reemphasized (pp. 91-92) that the "foundation of jurisdiction is physical power"; that substituted service must keep the foundation in mind. The same thought was expressed, also by Mr. Justice Holmes, in *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346:

> "(p. 353) Ordinarily jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign's pleasure. But when that power exists and is asserted by service at the beginning of a cause, or if the party submits to the jurisdiction in whatever form may be required,
>
> [Note: The power to seize (the basis of jurisdiction) is 'asserted by service']
>
> we dispense with the necessity of maintaining the physical power, and attribute the same force to the judgment or decree, whether the party remain

within the jurisdiction or not. This is one of the decencies of civilization that no one would dispute."

See also to same effect—*Ex parte Indiana Transportation Company, petitioner,* 244 U. S. 456 (Op. by Mr. Justice Holmes).

The court below views the subpoenas as mere notices of pre-existing jurisdiction *in personam* (R., 5131, p. 96; R., 5132, p. 92). This is the very theory repudiated by *McDonald* v. *Mabee, supra,* and by all the cases hereinbefore cited to the effect that jurisdiction *in personam* must be *"acquired"*, and that service of process is an assertion of power.

The court below cited *U. S.* v. *Bowman,* 260 U. S. 94; *U. S.* v. *Bennett,* 232 U. S. 299 and *Cook* v. *Tait,* 265 U. S. 47 (R., 5131, pp. 95-96; R., 5132, pp. 91-92), to the point that Congress has power to pass laws prescribing phohibitions on conduct of United States citizens abroad, and to the point that taxes may be collected from our citizens even though they and the sources of their incomes are abroad. The cases are not applicable for the reason that the laws with which they deal do not pretend to authorize the exercise of extra-territorial power by our Government. No sheriff or tax collector goes abroad to exert power on the citizen. The exercise of governmental power authorized by such legislation is confined exclusively to the United States. The thought was emphasized in *Rose* v. *Himely,* 4 Cranch 241 (Op. by Chief Justice Marshall); *U. S.* v. *Rodgers,* 150 U. S. 249 (Op. by Mr. Justice Field); *The Hamilton,* 207 U. S. 398 (Op. by Mr. Justice Holmes) and *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347 (Op. by Mr. Justice Holmes).

The court below said (R., 5131, p. 96; R., 5132, p. 92)—"In *Bartue* and *Duchess of Suffolk's Case,* 2 Dyer's Rep., 176, b. 73 Eng. Reprint 383, and in *Knowles* v. *Luce,* Moore's Rep. #(K. B.) 109, 72 Eng. Reprint 473, it was held that at common law the sovereign has a right to re-

call the subject or citizen from abroad and may seize and forfeit all his property if he refuses to return." The ancient powers of the English Crown are not important here for the reason that at the time of the first Judiciary Act, and before that, American common law required that judicial jurisdiction *in personam* must be acquired by appearance, or service at a place where the serving officer had authority to execute a writ of summons. *Robertson* v. *Railroad Labor Board,* 268 U. S. 619, *supra.* Moreover, the exercise of the right to recall is an executive or legislative function; it has never been claimed as a judicial right, and hence Congress, under the Constitution, could not confer it upon the Federal Judiciary. *Federal Radio Commission* v. *General Electric Co.,* 281 U. S. 464; *Meyers, Administratrix* v. *U. S.* 272 U. S. 52. The Crown procedure in those ancient English cases, indeed, the procedure in the case at bar, savors of outlawry. The English common law doctrine of outlawry and that of the continental systems as to "civil death" violate the rudimentary conception of the fundamental rights of the citizen. *Hovey* v. *Elliott,* 167 U. S. 409, 444.

Lastly, there is the question whether in the absence of treaties authorizing such action, Congress has constitutional power to authorize United States consuls to serve subpoenas (and orders to show cause). Under the Act (Act, Sec. 3), and giving effect to the principles already observed, it would seem clear that there is no such power. But in addition there are special and specific prohibitions. This court held in *In re Ross,* petitioner, 140 U. S. 453 (p. 462) that "the Constitution can have no operation in another country. When, therefore, the representatives or officers of our Government are permitted to exercise authority *of any kind* in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other." (Our italics.) And in *Dainese* v. *Hale,* 91 U. S. 13, it was expressly held that judicial powers cannot be exercised by consuls except by authority of treaty.

Under International Law consuls have no power except that conferred by treaty. *Wheaton's International Law* (8th Ed.) Sec. 110, pp. 176-177; *Hyde on International Law*, Vol. 1, pp. 460-462; *Moore: Report on Extra-territorial Crime and the Cutting Case* (Foreign Relations, 1887). Even the highly emergent right of a nation to proclaim the recall of its absent citizens in time of war does not break down the prohibition on the extra-territorial exercise of power. It cannot send its officers into other countries to round up absent citizens for return to service. *Crapo* v. *Kelly*, 83 U. S. 610.

We ask this court to take judicial notice that there are no treaties between this and other nations authorizing our consuls to serve witness-subpoenas.

POINT B.

The Act does not provide a valid method of acquiring judicial jurisdiction to render personal judgment against defendant and judgment against his property, hence all proceedings authorized by the Act leading to judgment against the person and property of defendant, the judgment itself and all subsequent proceedings authorized by it are void and violate due process under the Fifth Amendment of the Constitution.

Jurisdiction to punish is acquired under the Act by *quasi in rem* procedure (See opinion of court below, R., 5131, p. 99; R., 5132, p. 95). This also appears from the requirement of the Act that the marshal shall not take steps to publish and serve the order to show cause until after he has levied upon the property of the disobedient witness. (Act, Sec. 6).

The action is in fact in personam. Section 4 provides that if the person served with the subpoena shall neglect or refuse to appear, the court shall, upon proof

being made of the service and default, issue the order to show cause. *Section 7* provides that on the return day of the order to show cause, proof shall be taken; *and if the charge of "recusancy" against the witness shall be sustained,* the court shall adjudge him guilty of contempt, impose upon him a fine, and the amount thereof, unless paid, shall be satisfied out of defendant's attached property. The charge, therefore, is "recusancy"; the issue, therefore, is whether defendant is guilty or not guilty of "recusancy"; the trial is exclusively confined to that issue; the judgment is guilty or not guilty of contempt with fine, if guilty, to be satisfied, if not paid, out of defendant's attached property. It is a personal criminal offense—criminal contempt of court. *Michaelson* v. *U. S.*, 262 U. S. 42, 66, 67.

There is no charge, issue, trial or judgment as to "offending property". There is no charge, issue, trial or judgment as to money claims or property disputes. The action could not and does not assert a money claim against defendant on account of a possible fine, for the reason that the defendant in criminal contempt cases is presumed to be innocent. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 450, 451; *Michaelson* v. *U. S.*, 262 U. S. 42, 66, 67. In other words, the defendant is presumed not to owe the Government fine money. Hence, the action is not *in rem* or *quasi in rem*. It is not until after the trial has been completed, and until after the personal judgment of guilty of criminal contempt against defendant has been decreed, that the fine, if unpaid, is ordered satisfied out of the attached property.

Quasi in rem methods of acquiring jurisdiction *in personam* where there is no voluntary appearance or service of process within the territorial jurisdiction of the court, violate due process. *Pennoyer* v. *Neff*, 95 U. S. 714. *Quasi in rem* procedure must necessarily contemplate a *quasi in rem* judgment. A *quasi in rem* judgment is one which to comply with due process affects nothing

but the property under attachment. No part of the judgment resulting from *quasi in rem* procedure may stand as an unsatisfied judgment *in personam* against defendant. *Insurance Co.* v. *Bangs*, 103 U. S. 435, 439; *Pennoyer* v. *Neff*, 95 U. S. 714, 730; *Cooper* v. *Reynolds*, 10 Wall. 308, 318; *Cooley's Constitutional Limitations* (8th ed.) vol. 2, pp. 851-856.

When the *quasi in rem* procedure of the Act has run its course, there remains unsatisfied and outstanding in perpetuity the personal judgment against the defendant of guilt of the personal criminal offense—criminal contempt of court. As was developed in the preceding point (Point A), jurisdiction to render that kind of a judgment must be "acquired" by voluntary appearance or service within the territorial jurisdiction of the court (or by personal attachment).

Moreover, in federal courts, despite contrary legislation of Congress and contrary state practice, *quasi in rem* procedure is not used to acquire jurisdiction. In federal courts attachment is but an incident to a suit, and unless the court acquires jurisdiction over the person of the defendant by appearance or service of process within the court's territorial jurisdiction, the attachment must fall. *Toland* v. *Sprague*, 12 Pet. 300, 329; *Picquet* v. *Swan*, 5 Mason 35; *Big Vein Coal Co.* v. *Read*, 229 U. S. 31; *Laborde* v. *Ubarri*, 214 U. S. 173.

The court below cited *Big Vein Coal Co.* v. *Read*, *supra*, to sustain its contention that Congress may authorize *quasi in rem* procedure in contempt cases, picking up the following language of Justice Day in that case—"(229 U. S. 38) If Congress had intended any such radical change (a change of the settled rule that in order to issue an attachment the defendant must be subject to personal service or volnntarily appear in the action), it would have been easy to have made provision for that purpose, and doubtless a method of service by publica-

tion in such cases would have been provided." (Our parentheses).

That part of the opinion is *dictum*, but even if the language had direct bearing on the issues involved in that case, such "radical change" would have to be limited to defendants within the territory over which the United States exercises dominion, for otherwise it would precipitate an irreconcilable clash with the clearly established principle of due process that substituted service must keep close to the fact that "jurisdiction is power", is the power to seize (*McDonald* v. *Mabee*, 243 U. S. 90; *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346), and its corollary, that no state may exercise power within the territorial jurisdiction of another. Justice Day, moreover, was speaking of *quasi in rem* actions, not actions *in personam*.

The court below stated that contempt proceedings are *sui generis*. (R., 5131, p. 97; R., 5132, p. 93). We respectfully suggest that we are not concerned with *sui generis* proceedings, with contempt procedure under the general powers of federal courts, and with the attendant relaxations in the usual rules in connection with criminal offenses. We have for consideration express procedure under a special act of Congress in derogation of the common law which does not draw on the general powers of federal courts, which in fact is their antithesis, and which must be strictly construed according to its terms. *Galpin* v. *Page*, 18 Wall. 350.

If there is no jurisdiction to render the personal judgment of guilty of contempt of court, it follows there is no jurisdiction to sequester or sell the property, for those steps are entirely dependent upon the right to proceed to judgment on the issue of "recusancy".

POINT C.

The Act does not require actual or any other notice to defendant of the offense or of the Government's claim against his property, and hence violates due process under the Fifth Amendment of the Constitution.

The Act does not provide for notice of the charges or for notice of the claim against the sequestered property. (See Act). It provides for a bare citation to appear and show cause why the defendant should not be adjudged guilty of contempt, which citation may also contain notice (if the defendant is a property owner) that the court has directed attachment of undescribed property (Act, sections 4, 5, 6).

Congress drew the distinction, in contempt cases, between a bare citation to appear and show cause, and a notice of facts constituting an offense, when it enacted the following as a part of the Clayton Act. (U. S. C. Tit. 28, Sec. 387):

> "* * * which rule (rule to appear and show cause), *together with a copy of the affidavit of information, shall be served upon the person charged,* with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein." (Our italics).

See also *In re Rosser,* 101 Fed. 562 (C. C. A., 8th Circ. 1900, Op. by Circuit Judge Sanborn), approved in *In re Wood & Henderson,* 210 U. S. 246.

Special counsel for the Government in these cases interpreted the Act as not requiring notice to the defendant of his alleged offense or of the alleged claim against his property. In Case No. 5131, the only information served upon petitioner, or published, was contained in the order which confined itself to the arbitrary, utterly unsupported citation to appear and show cause why peti-

tioner should not be adjudged guilty of an undescribed contempt, and to notice that the court had ordered the attachment of undescribed property. (R., 5131, pp. 11-16; R., 5132, pp. 11-14).

In 5132 a similar order was served and published, except that the offense was stated to be "in neglecting, failing and refusing to obey *the subpoena* heretofore issued by said court and served upon him (petitioner.)" *The uncertainty and indefiniteness of the order in 5132 may be judged by the fact that when it issued, petitioner had already been served with three subpoenas involving two trials.* (R., 5131, pp. 7-10; R., 5132, pp. 8-9).

Whether the three subpoenas were served under the authority of the Act, or otherwise, did not appear in any publication or in any service upon petitioner. (R., 5131, pp. 7-10; R., 5132, pp. 4-5), and the Act does not require that such information shall appear. (See Act).

The Act is invalid, violating due process under the Fifth Amendment of the Constitution, because it does not provide that notice of the specific charges against the defendant and against his property shall be given. *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413.

POINT D.

The search and seizure of property authorized by the Act is an unreasonable search and seizure in violation of the Fourth Amendment.

Section 5 of the Act provides that the court may direct as a part of the order to show cause that the "property of the recusing witness, at any place within the United States, or so much thereof in value as the court may direct, shall be levied upon and seized by the Marshal of said court * * * to be held to satisfy any judgment that may be rendered against such witness in the proceeding so instituted." *Section 7* of the Act provides for the sale

of the property to satisfy any unpaid fine and the costs of the proceedings.

There is no way for the Marshal to find the property except to search for it and there is no limitation upon the place of search.

The search and seizure under the Act are made:

A condition precedent to judgment in the purely personal criminal action—criminal contempt of court (Act, Secs. 6, 7, 8); prior to trial or conviction of the offense contemplated by the Act (Act, Secs. 6, 7, 8); while the presumption of innocence obtains (*Gompers* v. *Bucks Stove and Range Co.*, 221 U. S. 418; *Michaelson* v. *U. S.*, 262 U. S. 42); without prior notice or hearing (Act, Sec. 5); without it being mandatory that defendant shall ever receive actual notice of or hearing on the seizure or final sale of the property (Act, Sec. 8); in the absence of personal jurisdiction over defendant (Act, Sec. 8); in the uncontrolled discretion of the court (Act, Sec. 5); without limitation as to the value of property seized, and at a time,—prior to trial and judgment, when it is impossible to establish a reasonable relationship between what is searched for and seized and what, if anything, will be required to satisfy the fine which the law presumes will not be adjudged (Act, Sec. 5); prior to the existence of any money claim against defendant, and in the absence of any property dispute or question of "offending" property (See Act).

All searches and seizures, whether or not for incriminating purposes, that "invade the sanctity of a man's home and the privacies of life", that invade his "indefeasible right of personal security, personal liberty and private property where that right has never been forfeited by his conviction of some public offense", and "whether accused of crime or not" violate the protection of the Fourth Amendment. *Boyd* v. *U. S.*, 116 U. S. 616; *Weeks* v. *U. S.*, 232 U. S. 383. We submit the search and seizure authorized by the Act, no matter how nicely it

may be executed by the Marshal, grossly offend the Fourth Amendment.

It is interesting to note that the Act, passed June 22, 1874, which was declared unconstitutional by the Supreme Court in the *Boyd* case, *supra*, had its origin in the acts of March 3, 1863 and March 2, 1867, both relating to customs matters. The Supreme Court (116 U. S. 616) said, on page 621:

> "It (the Act of 1863) was the first legislation of the kind that ever appeared on the statute books of the United States, and, as seen from its date, was adopted at a period of great national excitement. * * *" (Our parenthesis).

POINT E.

The provisions of the Act for hearing and judgment in the entire absence of the accused and without his consent violate due process under the Fifth Amendment of the Constitution.

Since the contempt originating under *Section 2* of the Act "is punitive in the public interest to vindicate the authority of the court and to deter other like derelictions", it is criminal contempt of court. *Ex parte Grossman*, 267 U. S. 87, 111. Criminal contempt of court is a criminal offense. *Grossman* case, supra; *Michaelson* v. *United States*, 266 U. S. 42, 66-67.

Ex parte Terry, 128 U. S. 289, established that at least at some stage of the proceedings to punish for criminal contempt, the court must have jurisdiction *in personam* over the defendant. We can find no precedent for a trial of a defendant charged with criminal contempt in his entire absence and without his consent. Under general criminal law such course of action is, of course, unthinkable.

But the Act authorizes punitive procedure against defendants beyond the jurisdiction of the United States

when the alleged offense was committed, who were not subsequently attached, or served with summons within the United States; who may never have appeared in the court room, who may never have plead to the charge, who may never have consented to proceedings in their absence, who may never have received notice of an offense. (See Act).

This feature of the Act was given practical construction by special counsel for the Government for, in the present cases, petitioner was tried in his absence and over his protest, after he had reserved his special appearances. (R., 5131, pp. 40, 53, 73, 84; R., 5132, pp. 22, 36, 57, 81).

Mr. Justice Curtis, when on Circuit announced in *U. S.* v. *Mayo,* (Fed. Cas. No. 15754, 26 Fed. Cas. p. 1230), that a defendant in a misdemeanor case might be tried in his absence if, among other conditions, special power of attorney to appear and plead and defend in defendant's absence were filed in court by the attorney for the defendant. The Act does not provide for anything of that kind. See also *United States* v. *Shelton,* 6 Fed. (2d) 897.

The court below said (R., 5131, p. 99; R., 5132, p. 95): "It is not necessary, therefore, to determine whether Sec. 4 of the Act authorizes a personal judgment in the absence of the recusing witness nor whether the prescribed procedure would constitute due process. We are convinced that Congress would have authorized the procedure under Sec. 5 irrespective of Sec. 4." But Congress did not do that and could not have done that without gutting the Act of whatever sense there may be in it. *Section 5* is completely dependent on *Section 4.* What would the *quasi in rem* procedure provided by *Section 5* apply to if not to the offense of contempt provided in *Section 4?* There is no issue under the Act except the personal issue, guilty or not guilty of contempt.

POINT F.

By excluding defendants in criminal prosecutions from the right to extra-territorial subpoenas, the Act violates that part of the Sixth Amendment of the Constitution providing that the accused in such actions shall have compulsory process for obtaining witnesses in his favor.

The subpoena authorized by the Act which may issue out of criminal cases is exclusively a Government subpoena (Act, Sec. 2). *Section 1* of the Act providing for a subpoena to follow the failure of letters rogatory, relates to civil cases. *Rep. of House Committee on the Judiciary,* No. 1313, 69 Cong. 1st. Sess., May 26, 1926, pp. 1-3. See also remarks of Senator Walsh in introducing the bill which became the Act. *Cong. Rec.* vol. 67, part I, page 613.

Moreover, letters rogatory rest entirely on the offer of the tribunal making the request "to do the like" for the other in a similar case. *Greenleaf on Evidence* (Redfield's Ed.) Sec. 320. *Section 4071 of the Revised Statutes* (U. S. C. Tit. 28, Sec. 701) limits the case in which we will honor letters rogatory to a "suit for recovery of money or property." Since then we cannot "do the like" for others, we cannot ask that letters rogatory, assuming they are available in criminal cases, shall be honored. Furthermore, letters rogatory, resting as they do on comity, are not compulsory.

Petitioner attacks the constitutionality of the Act because *Section 2,* which limits the availability of the subpoena to the Government, and therefore offends the Sixth Amendment, also directly and adversely affects him. If *Section 2* did not exist, the Act would not affect him at all.

Cases like *Blair* v. *U. S.* 250 U. S. 273, and *U. S.* v. *Watson,* 266 Fed. 736, where grand jury witnesses at-

tacked the constitutionality of acts creating the offenses under investigation, obviously are not applicable here. This petitioner does not attack the constitutionality of the statutes under which Sinclair and Fall were prosecuted, nor the resolutions prompting the prosecutions, nor the grand jury investigations preceding them. Petitioner directly attacks the Act, and that part of it which directly and adversely affects him.

POINT G.

The Act violates due process under the Fifth Amendment of the Constitution because it is arbitrary, capricious and unreasonable.

The punitive provisions of the Act can only operate after attachment of property. (Act, Secs. 5, 6, 7). In other words, the Act makes the ownership of "non-offending" property a condition precedent to judgment of guilt of crime.

The Act can have no purpose (aside from its special motive) other than to secure testimony from "any citizen of the United States" or from any person "domiciled therein" "who is beyond the jurisdiction of the United States" and whose "attendance at the trial of any criminal action" "is desired by the Attorney General or any assistant or district attorney acting under him." (Act, sec. 2). Clearly, the richest or the poorest may have testimony of value in a criminal case, and our absentees abroad embrace all degrees of wealth and poverty.

For the Act not to be arbitrary, capricious and unreasonable, there must be reasonable relationship between the punishment for disobedience and those who can be disobedient. It must apply to rich and poor alike. There is no demagogue in the Constitution.

The attachment is made despite the fact that under the Act the property cannot be "offending"; it is made prior to trial and therefore prior to the time that the amount of the fine (if defendant should be found guilty) can possibly be estimated, unless it is to be assumed that the court shall act on hearsay, or on preconceived notions, or on *ex parte* advice.

In view of the presumption of innocence, the possibility of proved innocence, of highly mitigatory defense, of guilt without mitigation, there cannot possibly be a reasonable relationship between the authorized unlimited attachment and the result of the trial.

The attachment is made while the defendant is presumed innocent and is therefore presumed not to owe the government the fine money which the Act intends shall be secured by the attachment. *Gompers* v. *Bucks Stove and Range Co.*, 221 U. S. 418; 450, 451; *Michaelson* v. *United States*, 266 U. S. 42, 66, 67.

Arbitrary, unreasonable, caprjcious legislation violates due process under the Fifth Amendment of the Constitution. *The Bank of Columbia* v. *Okely*, 4 Wheat 235, 244; *Hurtado* v. *California*, 110 U. S. 516, 532; *Leeper* v. *Texas*, 139 U. S. 462; *Scott* v. *McNeal*, 154 U. S. 34; *Twining* v. *New Jersey*, 211 U. S. 78, 101.

PROCEDURAL POINTS.

Point H-(a)—Lack of Proper Showings for the Subpoenas.

Section 2 of the Act makes "proper showing" a condition precedent to the issuance of subpoenas under the Act. The alleged showings in these cases rest upon nothing more than a state of mind—a series of beliefs. "Your petitioners believe and therefore aver"—"because as your petitioners aver, they believe"—"your

petitioners believe and therefore aver". (R., 5131, pp. 1-3; R., 5132, pp. 1-2).

"A showing is that which is done to make apparent or clear by evidence, by proof", *Bouvier's Law Dictionary* (Baldwin's Library Ed.) 36 Cyc. 434: "beliefs" are not proof; they are not evidence. *Handford* v. *Duchastel* (Court of Errors and Appeals of N. J.) 93 Atl. 589; *Kennedy* v. *Chumar*, 26 N. J. L. 305. No proof, no evidence, no facts were before the trial court, and hence there was nothing before it upon which to exercise its discretion.

The provision for a proper showing is for the protection of the citizen and such provisions are not directory but mandatory, "they must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise." *French* v. *Edwards*, 13 Wall. 506.

There having been no "proper showing", the witness-subpoenas and the proceedings subsequent to their issuance, were invalid and purely arbitrary. Due process is not arbitrary process, it is in accord with settled principles, maxims and rules of law which govern society. *Cooley, Constitutional Limitations*, pp. 356. *Chicago & Ry. Co.* v. *Chicago*, 166 U. S. 226, 240; *Dartmouth College case*, 4 Wheat. 518, 581; *Bank of Columbia* v. *Okely*, 4 Wheat. 235.

Point H-(b)—Subpoenas Did Not Carry Notice of the Act.

At common law, it could not be contempt to disobey an extra-territorially served witness-subpoena. *Robertson* v. *Railroad Labor Board*, 268 U. S. 619. The witness-subpoenas in these cases were all served upon petitioner at Paris, France. (R., 5131, pp. 7-10; R., 5132, pp. 4-5). Petitioner, therefore, might disregard their commands, —there could be no offense, unless they carried notice, or unless in some other way they were supplemented with

proper official notice that they had issued and had been served pursuant to the provisions of the Act in question.

The Government's proof of this element of its burden consisted in submission of the subpoenas and the returns of consuls serving them. The subpoenas and the returns carried no word of the Act. (R., 5131, pp. 7-10; R., 5132, pp. 4-5). Neither petitioner nor his counsel, looking at the subpoenas, or considering them in the light of their service or the tenders of money (R., 5131, pp. 8-10; 5132, p. 9) by the consuls, could tell that they had issued under authority of the Act, and since they were in the ordinary form of subpoenas, and since they were served extra-territorially, petitioner and his counsel were entitled to assume that, regardless of the existence of the Act, the testimony was being sought under the general powers of the court, and by that same token might be disregarded. *Robertson* v. *Railroad Labor Board*, 268 U. S. 619.

A contempt action cannot be based upon a void subpoena. *Ex parte Fiske*, 113 U. S. 713. The subpoenas, because they were general and failed to carry notice of the Act did not give the court personal jurisdiction of petitioner, and without such personal jurisdiction it was a violation of due process to proceed against him. *Pennoyer* v. *Neff*, 95 U. S. 714; *Galpin* v. *Page*, 18 Wall. 350.

Point H-(c)—No Notice of Offense or of Claim Against the Property.

Under our point C we have already shown that the orders to show cause did not contain and were not supplemented with notice of petitioner's alleged offenses and the alleged claims against his attached property.

Petitioner never waived his right to notice. He protested the lack of notice before the trial commenced, at the conclusion of the Government's main case, and at the conclusion of the testimony (R., 5131, pp. 72, 74, 84; R., 5132, pp. 56, 59, 60, 80). The omissions of notice in the

orders to show cause was not otherwise supplied by the consuls in making their services or in any other authorized or official manner (See Record). The publication in the two cases was accomplished by the simple expedient of publishing copies of the orders to show cause (R., 5131, p. 14; R., 5132, p. 12).

It should be understood that we are not contending as to the "form" of notice. We protest the total lack of notice in any form. The informalities of procedure and varieties of method that may be permitted in bringing notice to defendants in criminal contempt actions do not eliminate the requirement of due process for notice of some kind, in some form, to defendants not charged with contempt "in the face of the court." *Cooke* v. *U. S.*, 267 U. S. 517. There can be no procedure against property without giving the owner notice of the claim. Failure to provide such notice violates due process. *Windsor* v. *McVeigh*, 93 U. S. 274.

The court below declared petitioner will not be permitted to challenge the sufficiency of the notice because evidence was introduced by his counsel in extenuation and mitigation (R., 5131, p. 98; R., 5132, p. 94). The contrary, however, has been well established by this court. See *Ex parte Indiana Transportation Company, Petitioner*, 244 U. S. 456; *Harkness* v. *Hyde*, 98 U. S. 476; *Munter* v. *Weil Corset Co.*, 261 U. S. 276, to the point that when objections to the jurisdiction have been overruled, the defendant does not lose his rights by pleading to the merits. The records in these cases abound with petitioners' objections to the jurisdiction, which were uniformly overruled (R., 5131, pp. 33-34, 72, 73, 74, 84; R., 5132, pp. 21, 35-42, 57, 60, 70, 80, 81).

Point H-(d)—Abandonment of Levy and Seizure in 5131.

The seizure of property is the basis of jurisdiction for the punitive procedure under the Act (Act, Sec. 6).

In each case the Marshal levied upon and seized the same Liberty bonds of petitioner (R., 5131, pp. 74-75). The seizure in 5132 of the same Liberty bonds which had already been seized and set aside in 5131 was not requested by special counsel for the Government (R., 5132, p. 7), was not authorized by the court (R., 5132, p. 11), and was not a seizure of an equity that might remain after satisfaction of any fine that might result in 5131. It was a separate, independent, physical seizure of the same bonds which had been levied upon, seized, set aside and dedicated to the security of 5131 (R., 5132, p. 12); and was therefore antagonistic to and inconsistent with the maintenance of the levy and seizure in 5131. A second antagonistic and inconsistent levy and seizure by the same party on the same property works an abandonment of the first levy and seizure. *Freeman on Executions,* Sec. 50; *Hermann on the Law of Executions,* p. 252; *Scott's Execs.* v. *Hill,* 6 N. C. 143; *Alley* v. *Carroll,* 35 Tenn. 110.

Furthermore, the Act, in derogation of the common law, which must be strictly construed, does not authorize successive levies upon and seizures of the same property. *Section 5* provides that the property seized shall "be held to satisfy any judgment against such witness in the proceeding *so instituted.*"—not successively instituted. It results that there was an abandonment of the levy and seizure (jurisdiction) in 5131 or there was nothing available to seize and levy upon—to establish jurisdiction—in 5132. To proceed without jurisdiction violates due process under the Fifth Amendment. *Pennoyer* v. *Neff,* 95 U. S. 714.

POINT H-(E)—IN 5132, PETITIONER WAS NOT SUBPOENAED TO ATTEND A TRIAL ON APRIL 9, 1928.

In 5132 petitioner was served with a subpoena which commanded his attendance at the Sinclair-Fall trial on Monday April 2, 1928 to testify on behalf of the United

States and not depart the court without leave of the court or district attorney (R., 5132, p. 8).

The Sinclair-Fall case was tried on April 9, 1928 (R., 5132, p. 7). Petitioner was not subpoenaed to attend a trial on April 9, 1928. On April 2, 1928 there were no proceedings of any kind in the Sinclair-Fall case. (R., 5132, p. 67).

The command of the subpoena "not to depart the court without leave of the court or district attorney", was gratuitous. The Act does not authorize it. The Act commands attendance at a trial at a time and place designated. (Act, Sec. 2). The offense under the Act is the failure to appear as "in such subpoena directed". (Act, Secs. 4 and 7). The Act is special, is in derogation of the common law and should be strictly construed in favor of the defendant. There was no offense in 5132, and hence no jurisdiction to punish. Proceedings without jurisdiction violate due process. *Pennoyer* v. *Neff*, 95 U. S. 714.

CONCLUSION.

It is therefore respectfully submitted that these cases call for the exercise by this Court of its supervisory powers, and that writs of certiorari should be granted and this Court should review the decisions in these cases of the Court of Appeals of the District of Columbia and finally reverse them.

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Counsel for Petitioner.

ANNEX.

THE ACT OF JULY 3, 1926.

(c. 762; 44 Stat. 835; U. S. C. tit. 28, Secs. 711 to 718, inc.)

711. (Sec. 1.) *Letters rogatory to take testimony of witness, addressed to court of foreign country; failure of witness to appear; subpoena.*— Whenever letters rogatory shall issue out of any court of the United States, either with or without interrogatories addressed to any court of any foreign country, to take the testimony of any witness, being a citizen of the United States or domiciled therein, and such witness, having been personally notified by it according to the practice of such court, to appear and testify pursuant to such letters rogatory and such witness shall neglect to appear, or having appeared shall decline, refuse, or neglect to answer to any question which may be propounded to him by or under the authority of such court, to which he would be required to make answer were he being examined before the court issuing such letters, the court out of which said letters issued may upon proper showing order that a subpoena issue addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the said court at a time and place therein designated.

712. (Sec. 2.) *Trial of criminal actions; witness beyond jurisdiction of United States; issue of subpoena addressed to consul in foreign country.*—Whenever the attendance at the trial of any criminal action of a witness, being a citizen of the United States or domiciled therein, who is beyond the jurisdiction of the United States, is desired by the Attorney General or any assistant or dis-

trict attorney acting under him, the judge of the court before which such action is pending, or who is to sit in the trial of the same, may, upon proper showing, order that a subpoena issue, addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the said court at a time and place therein designated.

713. (Sec. 3.) *Service of subpoena on witness in foreign country.*—It shall be the duty of any consul of the United States within any country in which such witness may be at the request of the clerk of the court issuing any subpoena under this Act or at the request of the officer causing such subpoena to be issued, to serve the same personally upon such witness and also to serve any orders to show cause, rules, judgments, or decrees when requested by the court or United States marshal, and to make a return thereof to the court out of which the same issued, first tendering to the witness the amount of his necessary expenses in traveling to and from the place at which the court sits and his attendance thereon, which amount shall be determined by the judge on issuing the order for the subpoena and supplied to the consul making the service.

714. (Sec. 4.) *Failure of witness to obey subpoena; order to show cause in contempt proceedings.*—If the witness so served shall neglect or refuse to appear as in such subpoena directed, the court out of which it was issued shall, upon proof being made of the service and default, issue an order directing the witness to appear before the court at a time in such order designated to show cause why he should not be adjudged guilty of contempt and be punished accordingly.

715. (Sec. 5.) *Direction in order to show cause for seizure of property of witness in contempt.*— Upon issuing such order the court may, upon the giving of security for any damages which the recusing witness may have suffered, should the charge be dismissed (except that no security shall be required of the United States) direct as a part of such order that the property of the recusing witness, at any place within the United States, or so much thereof in value as the court may direct, shall be levied upon and seized by the marshal of said court in the manner provided by law or the rule of the court for a levy or seizure under execution, to be held to satisfy any judgment that may be rendered against such witness in the proceeding so instituted.

716. (Sec. 6.) *Service of order to show cause.*—The marshal, having made such levy, shall thereupon forward to the consul of any country where the recusing witness may be a copy of the order to show cause why such witness should not be adjudged guilty of contempt with the request that said consul make service of the same personally upon the recusing witness, and shall cause to be published such order to show cause and for the sequestration of the property of such witness, in some newspaper of general circulation in the district within which the court issuing such order sits, once each week for six consecutive weeks.

717. (Sec. 7.) *Hearing on order to show cause; judgment; satisfaction.*— On the return day of such order or any later day to which the hearing may by the court be continued, proof shall be taken; and if the charge of recusancy against the witness shall be sustained, the court shall adjudge him guilty of contempt and, notwithstanding any limitation upon the power of the court gen-

erally to punish for contempt, impose upon him a fine not exceeding $100,000 and direct that the amount thereof, with the costs of the proceeding, be satisfied, unless paid by a sale of the property of the witness so seized or levied upon, such sale to be conducted upon the notice required and in the manner provided for sales upon execution.

718. (Sec. 8.) *Opening judgment when rendered upon service by publication.*—Any judgment rendered pursuant to this Act upon service by publication only may be opened for answer within the time and in the manner provided in section 57 of the Judicial Code.

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Supreme Court of the United States.

OCTOBER TERM—1931.

No. 200—No. 201.

HARRY M. BLACKMER,
Petitioner,

v.

UNITED STATES,
Respondent.

REPLY OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRITS OF CERTIORARI.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—1931.

No. 200. No. 201.

HARRY M. BLACKMER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

REPLY OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRITS OF CERTIORARI.

To The Honorable, Charles Evans Hughes, Chief Justice of the United States, and the Associated Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

PRELIMINARY.

Respondent Does Not Request the Denial of Writs of Certiorari.

We first invite attention to the fact that respondent does not ask for denial of writs of certiorari (R. B. 45) and leaves unanswered the reasons relied on by petitioner for the allowance of the writs (Petition, pp. 13-18). Everything following respondent's formal opening statement that its brief is "in opposition to the pe-

titions for writs of certiorari" (R. B. 1) is in fact a brief in opposition to the brief of petitioner and to petitioner's incidental prayer for reversal of the judgments after review on the merits.

Among its other equally interesting contentions, respondent urges that under the Act,—process may be served "beyond the jurisdiction of the United States"; that such process, its service, and the accompanying tender of witness fees (all invalid under the common law) need not carry notice of the Act to render them valid; that *quasi in rem* (or *in rem*) procedure may be used to acquire jurisdiction to try a personal criminal offense; that a *quasi in rem* judgment may be used to punish a personal criminal offense; that one accused of a personal criminal offense may be tried and sentenced in his absence, without waiver of his presence, without requirement of official notice of the specific charges against him; that property of the accused may be seized in advance of trial and in advance of notice of an offense, to satisfy a possible fine resulting from a proceeding wherein the presumption of innocence prevails; that the ownership of "non-offending property" is a condition precedent to punishment of a criminal offense which may be committed by non-property owners as well as by property owners; that United States consuls abroad may perform functions delegated to them by Congress without the authority of a treaty; that letters rogatory are compulsory process and are available to defendants in criminal actions.

It is not strange, therefore, that counsel for respondent, while urging the validity of these features of the Act, and the procedure in the cases at bar, did not deny their importance, or their radical, unprecedented nature, and, hence, could not well contest their review.

Proper Effect Not Given to Applicable Decisions of This Court.

The Act, and the procedure under it in the cases at bar, if valid, will open to the Congress and to forty-eight state legislatures limitless, untouched power over the citizen which history indicates will be exploited promptly with resulting new crops of litigation in fields where this court has labored mightily to establish settled conceptions. This consideration alone called for careful attention to the opinions of this court and for thorough exposition of the support to be derived from them. Study of the opinion of the court below and of respondent's answering brief in order to determine the effect therein given to the precedents of this court, shows that:—

1. Neither the court below nor respondent cited a single case of this court *directly* supporting a single one of their respective theories on the points brought here by petitioner.

2. The court below did not distinguish a single decision of this court cited by petitioner—decisions which we say control the issues, but which under any viewpoint have bearing and which, we respectfully submit, should be accepted, reconciled or demonstrated to be irrelevant in any serious discussion of the issues. Respondent contented itself with an out-of-hand classification of a few only of the numerous decisions of this court cited by petitioner in his main brief herein (P. B. 26-27).

3. The court below and respondent cited cases of this court for *indirect* support of five of the points urged here by petitioner. Seven of the twelve points are without the support of a decision of this court.

The *indirect* support referred to is illustrated by that part of the opinion of the court below dealing with the question of the validity of the extraterritorially served subpoena (R., 5131, pp. 95-97; R., 5132, pp. 91-93). After

characterizing the question as the one of controlling importance in these cases, the court below declared the subpoena valid on a group of cases defining the duties of allegiance, but having nothing to do with methods for acquiring judicial jurisdiction *in personam*, on cases illustrating English Crown powers in direct conflict with the common law of this country at the time of the adoption of the constitution, on cases having to do with the direct exercise of power *within the United States over citizens within the United States* with respect to their offenses committed or taxes incurred while outside of the United States. Not one of the numerous beacon-light decisions of this court on the method for acquiring jurisdiction *in personam* and on the reach of process, was even mentioned.

4. The court below made no reference to one of the most important points in the cases, viz., that the Act, in derogation of the common law, fails to provide for notice to the accused of his offense or the claim against his property. The provisions authorizing trials *in absentia* of criminal contempt of court were disposed of on the amazing theory that Congress would have enacted the punishment procedure "irrespective of Sec. 4" of the Act which defines the offense (R., 5131, p. 99; R., 5132, p. 95).

The failure of zealous counsel for respondent to find direct precedents and their unwillingness to discuss the decisions of this court, afford additional demonstration of the unprecedented character of their theories and possibly of the fact that discussion of cases cannot profit their contentions.

Under these circumstances, the decisions of the court below, whether right or wrong, in a case of such notoriety, so sharply under the eye of the profession, launching into the law a dozen unprecedented doctrines, —are bound to leave serious doubts which if allowed to remain unclarified will inevitably open a veritable Pandora's Box of troublesome questions and new mischiefs.

Arguments of Expediency.

Respondent and the court below give weight to arguments of expediency to the effect that it is unthinkable that this government is helpless to command the testimony of its absent citizens; that such testimony might be as important as the citizen's military service (R., 5131, 106; R., 5132, 102; R. B. 25).

As to this, we think it sufficient to say (1) the Constitution itself renders the Government helpless to do many things it might otherwise desire to do. The restraint tends to preserve the proper liberties of the citizen. The power to summon a citizen from the ends of the earth by the extraterritorial exercise of judicial jurisdiction, whose testimony has never been given to any prosecutor or grand jury, and on a mere showing of a "belief" that the citizen could tell something important at the trial of persons already indicted and arrested, might well be considered as an arbitrary exercise of power to be repelled rather than legitimatized. (2) The Government has preserved its existence for about 140 years without the power, during which time prosecutors have worried along with evidence in hand. There is no record that judges, bar associations, or prosecutors (other than the special prosecutors in these cases) have clamored for the right to reach into foreign countries for witnesses. (3) The power as it relates to witness-subpoenas, puffed into the semblance of importance by likening it to the recall of absent citizens in time of war, meets the deflating opinion of *Crapo* v. *Kelly*, 83 U. S. 610, wherein this court pointed out that no official may go into foreign countries to seize citizens desired for military service. (4) The power as it relates to witness-subpoenas, puffed into the semblance of importance, by saying that the "Government" wants to use it, meets the deflating opinion of *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, wherein it was held that the prohibition on extra-

territorial exercise of power applies to the Government as well as to private parties. (5) It may be conceded that the Act in question is unconstitutional without it following that a valid law could not be enacted which would serve the same purpose even more efficiently. If the authors of the Act had not sought their precedents in outlawry (seizure of property to coerce appearance), the Inquisition (subpoenas on "belief" and trials *in absentia*), and the religious quarrels of the reign of Queen Elizabeth (for the name of the crime—"recusancy"),—had instead paid more attention to the decisions of this court, a way would have opened. (6) It is a rather narrow expediency which sees a single witness and is blind to the impolicy of unauthorized exercise of power within the territory of foreign nations, of trials of citizens for criminal offenses *in absentia*, of trials of citizens for criminal offenses without notice, on mere showings of "belief", etc.

REPLY A.

The Invalid Consular Function.

Respondent argues (R. B. 15-16) that the consul in making the service of the subpoena acts in a ministerial rather than a sovereign capacity; that the Act designates him to save the expense of sending a specially deputized officer from the United States to make the service; that in respondent's opinion, the service might just as well have been made by registered letter, or by telegram, if so authorized by statute.

Consular functions, whatever their character, are limited to those provided in treaties and auxiliary legislation. *In re Ross, Petitioner,* 140 U. S. 453; *Glass* v. *The Sloop Betsey,* 3 Dallas 6; *Wheaton's International Law,* 8th Ed., Sec. 110, pp. 176-177; *Hyde on International Law,* Vol I, pp. 460-462; *Report on Extraterri-*

torial Crime and the Cutting Case, by John B. Moore, Foreign Relations, 1887.

Under the Act in question, the consul represents the United States court and delivers its command, which, if effective at all, is just as effective, is entitled to the same measure of respect and obedience, as a verbal command delivered directly from the bench by the judge of the court to a citizen within the court-room. We submit the service of a subpoena is the exercise of judicial jurisdiction; but whether it is the exercise of judicial jurisdiction, or the mere service of a notice, it is made a consular function by the Act, and as such, because it is not authorized by treaty, it is void. In the basic nature of the power exercised there is not the slightest distinction between the attachment of property by a United States consul which this court in *Dainese* v. *Hale,* 91 U. S. 13, declared could not be done validly without authority of a treaty, and the service by a consul of a witness-subpoena. Both are methods of acquiring judicial jurisdiction.

That the same function might be performed through the mails (if it might), or that the same function might be performed by a specially deputized officer (if it might) has not the slightest bearing; the point is not how it might have been done under a different act, but was it done validly, may a consul do it validly pursuant to the Act in question?

Whether the subpoenas were served against the will of France, or over the objections of France, does not appear of record; the main point is the subpoenas were served against the will of the United States Constitution which has no operation in foreign countries except by virtue of treaty. *In Re Ross, Petitioner,* 140 U. S. 453.

With a treaty, extraterritorial exercise of power is valid because the Constitution has provided treaty-making power (Const. Art. II, Sec. II., Cl. 2). *The right asserted by Congress, through the Act in question, to amend by statute the nation's consular conventions by*

adding consular functions not therein authorized, is a clear and unauthorized usurpation of the treaty-making power.

The power of this nation under the Constitution does not depend upon whether or not France objects to something or other, nor does the territorial field for the exercise of constitutional power expand or contract according to whether physical force is used.

It makes not the slightest difference in principle whether the extraterritorial exercise of power consists of armed aggression, of putting hand-cuffs on a citizen, of acquiring jurisdiction through attachment of property, or of handing a citizen the printed command of a court. The peaceable service of the subpoena is an invasion of the foreign sovereign. *Cooley's Const. Limitations (8th Ed.)* Vol. 2, p. 852; *De la Montanya* v. *De la Montanya* (Calif.) 44 Pac. 345, 346.

Every exercise of power by this nation to be valid must be under the Constitution. *Hodgson* v. *Bowerbank,* 5 Cranch. 303; *Downes* v. *Bidwell,* 182 U. S. 244; *Dorr* v. *United States,* 195 U. S. 138. The meticulous, carefully guarded limitation of the consular function will be noted by the most hasty glance at any of our consular conventions, and notably those between this nation and France. *Malloy's* Vol. I, pp. 490, 528. The express recogniton of Congress of the dependence on treaties of its legislation respecting consuls (particularly in their exercise of judicial power) may be noted in *U. S. C.* Tit. 22, Secs. 141, 143, 146, 163, 177, 191.

Respondent's Doctrine of Jurisdiction in Personam by Virtue of Sovereign Control.

As to respondent's theory that the subpoena is valid because of the "duty of protection of the citizen by the government and obedience by the citizen to his government whether at home or abroad" (R. B., 16):

It is intended that the theory shall supply the philosophical premise of a method for acquiring jurisdiction *in personam* over a citizen "beyond the jurisdiction of the United States" which does not depend upon the extraterritorial exercise of power. It is evident that the proponents of the theory must argue, as they do argue here, that the service of the subpoena under the Act is not an exercise of power, is nothing more than a notice of pre-existing jurisdiction *in personam* over the desired witness (R. B., 16).

The leading case on jurisdiction *in personam* by virtue of the duty of allegiance is *Mabee* v. *McDonald,* 107 Tex. 139; 175 S. W. 676, reversed by this court in *McDonald* v. *Mabee,* 243 U. S. 90. In *Mabee* v. *McDonald, supra,* the theory is termed the doctrine of "Sovereign Control". For convenience, we shall adopt that description of it.

Jurisdiction *in personam* by virtue of Sovereign Control assumes that such jurisdiction once authorized by statute is thereafter ever-present and continuous and all that is required to give it full effect in a particular case, as to a particular person, is to furnish notice of it.

Petitioner, on the other hand, takes the position that the court's command to a desired witness to attend a trial is a purely personal command; that before the court can validly charge an obligation to obey this purely personal command, it must acquire jurisdiction *in personam* over the desired witness; that jurisdiction *in personam* is not, and under due process cannot be, continuous and ever-present; that it is discontinuous, does not exist at all unless actually acquired in each case; that to comply with due process, jurisdiction *in personam* must be acquired by voluntary appearance or service of process within the territorial jurisdiction of the court; that service of process is an exercise of power; that by reason of the character of this nation as an equal sovereignty under the Constitution, the exercise of all governmental power, including the service of process, is confined to

the territory over which this nation exercises dominion, from which we draw the conclusion that the service of the subpoena which under the Act must be "beyond the jurisdiction of the United States", is invalid. Our position, we think, is clean-cut; it rests squarely upon oft-repeated principles in leading case opinions of this court. We shall not labor it further.

We summarize our opposition to the Sovereign Control method of acquiring jurisdiction *in personam* as follows:

1. Jurisdiction *in personam* in the Sovereign Control theory was squarely presented to and repudiated by this court in *McDonald* v. *Mabee,* 243 U. S. 90,* which reaffirmed that to comply with due process, methods for the acquisition of jurisdiction *in personam* must keep close to the fact that jurisdiction is power—is the power to seize (our main brief, pp. 26-27).

The principle of *McDonald* v. *Mabee, supra,* that jurisdiction is power, is the power to seize, applied in that case to the question of the validity of service by publication, which method of service proceeds on the presumption that a citizen is within the territorial jurisdiction (and at his domicile in cases of substitute service), is doubly condemnatory of the Act now before this court which excludes all such presumptions or fictions by expressly confining itself to persons "beyond the jurisdiction of the United States".

It should be added that the Act does not depend upon the citizenship of the desired witness, has no relation to "status" questions, makes nothing of the domicile of the absent citizen, or of whether the desired citizen is temporarily absent, or permanently absent, or whether

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**Footnote*: On page 26 of our Main Brief, it was inadvertently stated that *McDonald* vs. *Mabee, supra,* involved the question whether "extraterritorial service of process" is valid to establish jurisdiction *in personam.* The direct question in the case concerned the validity of service by publication for jurisdiction *in personam.* The invalidity of extraterritorial service appears from the repeated thought of the opinion that "the foundation of jurisdiction is physical power".

his residence is here or abroad, and respondent made nothing of those matters in its request for the subpoena (R. 5131, pp. 1-3; R. 5132, pp. 1-3). (Petitioner had been abroad continuously more than three years when the first subpoenas issued, R. 5131, pp. 7, 18, 19, and almost four years when the last subpoena was served. (R. 5132, pp. 8, 16-19.)

2. The special Act under consideration, in derogation of the common law, to be strictly construed according to its terms (*Galpin* v. *Page*, 18 Wall. 350)—(a) does not provide for jurisdiction to command the witness by virtue of Sovereign Control; the Act excludes the theory because it applies equally to citizens and to aliens (to citizens *or* to persons "domiciled" in the United States) (Act, secs. 1 & 2); (b) it does not fix a continuous duty on absent citizens, requiring merely a notice for its complete maturity; on the contrary, it provides that no subpoena shall issue except upon "a proper showing" in connection with a specific criminal case (Act, sec. 2); (c) does not provide punishment for failure to comply with an obligation matured with a notice; it provides punishment for failure to obey the command of the subpoena issued only after proper showing (Act, secs. 2, 7); (d) does not provide punishment for failure to obey a notice; (e) does not provide for converting the subpoena into a notice of pre-existing jurisdiction; it excludes such notions by providing the subpoena shall be a command to appear at a certain court to testify at a certain trial, at a certain time (Act, sec. 2), and that the service and default of the subpoena shall be the indispensable elements for jurisdiction to punish (Act, sec. 4).

The subpoenas served in the cases at bar did not contain notice of pre-existing jurisdiction over petitioner (R. 5131, pp. 7, 9; R. 5132, p. 4); they contained commands to appear. If the Act intended to provide any novel theory for establishing jurisdiction *in personam*, it would have required that the subpoenas must carry

notice of the Act. There is no such provision; the subpoenas issued in the cases at bar did not carry such notice (R. 5131, pp. 7, 9; R. 5132, p. 4). Respondent states the Act does not intend that they shall carry such notice (R. B. 41).

Respondent's South Dakota Case on Extraterritorial Service of Process.

Respondent declares: "A judgment *in personam* may be rendered in state courts against a citizen absent from the state, where service is personally made without the state under a statute so authorizing" (R. B. 28).

We pass the patent inconsistency of arguing "Sovereign Control" which is intended to obviate the extraterritorial exercise of power, and the instant theory which is directly based thereon.

Under this heading respondent cites *In re Hendrickson*, 167 N. W. 172 (So. Dak. 1918), the only case in its brief (omitted in the opinion of the court below where it was also urged) which squarely holds that jurisdiction *in personam* may be acquired by the extraterritorial service of process.

The South Dakota court based its decision on the doctrine of Sovereign Control which it took from *Mabee* v. *McDonald, supra.* We have seen that the doctrine was repudiated by this court in *McDonald* v. *Mabee, supra.* The *Hendrickson case,* decided in March, 1918, did not mention *McDonald* v. *Mabee, supra,* decided in March, 1917, and it must be assumed, therefore, that the latter decision was not brought to the attention of the South Dakota court.

There is additional irony in the fact that the Texas Supreme Court did not intend that its repudiated doctrine should cover extraterritorial exercise of power. Please note the following passage in the *Mabee* decision:—

(175 S. W., pp. 676, 688) "*Smith* vs. *Grady, Ex'r*, 68 Wis. 215, 31 N. W. 477. There a personal judgment by a Canadian court was held void because it was based solely upon service made upon the defendant in that action, personally in Wisconsin; there being no personal appearance * * * that decision rests squarely upon the proposition that 'jurisdiction cannot be acquired or exercised over persons or property without the territorial limits of the government where the court sits'; by 'service of process in another state or foreign country'. *That was not attempted in the case at bar.*" (Our italics).

The reason for the distinction is apparent from the fact that the doctrine of Sovereign Control is an invention designed to circumvent the prohibition on extraterritorial exercise of power.

Respondent also cites *Nichols* v. *Vaughan*, 217 Mass. 548 (1914), 105 N. E. 376, (also omitted in the opinion of the court below where it was urged). The quoted extract from the case which appears in respondent's brief seems to support the proposition that jurisdiction *in personam* may be acquired over one *domiciled* within the state (the Act does not depend upon the domicile of the absent citizen) by extraterritorial service of judicial process, but respondent fails to advise this court that the case went off on interpretation of a Massachusetts statute of limitations; that the Supreme Court of that state did not accept the opportunity, which it expressly considered, to rest its decision on the validity of extraterritorial service of process. The reason appears very clearly in the following language of the opinion:

(105 N. E. 377, 378) "The defendant contends that these decisions are no longer law because of *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565, wherein it was held that there could be no personal judgment against a non-resident defendant over whom jurisdiction was obtained solely by attachment of property. That case does not go to the extent of holding that the courts of the state in

which one is *domiciled* and to which he owes allegiance cannot acquire jurisdiction over him so as to be able to render a judgment *in personam* except after personal service of process upon him within the state. There are, however, expressions in several decisions of that court which lend support to that view. *Freeman* v. *Alderson*, 119 U. S. 185, 188, 7 Sup. Ct. 165, 30 L. Ed. 372; *Clark* v. *Wells*, 203 U. S. 164, 170, 27 Sup. Ct. 43, 51 L. Ed. 138; *Caledonian Coal Co.* v. *Baker*, 196 U. S. 432, 444, 25 Sup. Ct. 375, 49 L. Ed. 540; *Goldey* v. *Morning News Co.*, 156 U. S. 518, 521, 15 Sup. Ct. 559, 39 L. Ed. 517; *Mexican Central R. R.* v. *Pinkney*, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699; *Noble* v. *Union Ring Logging Co.*, 147 U. S. 165, 173, 13 Sup. Ct. 271, 37 L. Ed. 123; *Harkness* v. *Hyde*, 98 U. S. 478, 25 L. Ed. 237. *Cooper* v. *Reynolds*, 10 Wall. 308, 19 L. Ed. 931, goes very far toward sustaining that contention. It is supported by *Raher* v. *Raher*, 150 Iowa, 511, 129 N. W. 494, 35 L. R. A. (N. S.) 292, Ann. Cas. 1912D, 680, *De la Montanya* v. *De la Montanya*, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165, *Smith* v. *Grady*, 68 Wis. 215, 31 N. W. 477, and *Moss* v. *Fitch*, 212 Mo. 484, 111 S. W. 475, 126 Am. St. Rep. 568. See Ann. Cas. 1912D, 680. Of course if that is the law under the fourteenth amendment of the federal Constitution, as established by the Supreme Court of the United States, it is authoritative and binding upon all state courts. *Eliot* v. *McCormick*, 144 Mass. 10, 10 N. E. 705. See also *Porter* v. *Prince*, 188 Mass. 80, 74 N. E. 256. *But however that may be, the point here presented is one of interpretation of our statute of limitations and not one of sufficiency of service of process.*" (Our italics.)

In view of the abundance of decisions of this court declaring what we conceive to be clear law on the jurisdictional point under consideration, we excluded discussion and citation of decisions by state courts from our main brief. If, however, this court should be interested in state decisions, it will be found that the following fully sustain every contention of petitioner as to the invalidity

of extraterritorially served process: *Moss* v. *Fitch et al.*, (Mo. 1908), 111 S. W. 475; *Raher* v. *Raher* (Iowa, 1911), 129 N. W. 494; *De la Montanya* v. *De la Montanya* (Calif. 1896), 44 Pac. 345 (cited in *McDonald* v. *Mabee, supra*); *Smith* v. *Grady* (Wisc. 1887) 31 N. W. 477; *Grubel* v. *Nassauer*, 210 N. Y. 149, 103 N. E. 1113 (Ct. of Appls.).

These cases adopt the premise, frequently repeated by this court, that no sovereignty can extend its process beyond its territorial limits to subject either persons or property to its judicial decisions, and several of the cases take pains by analysis of the opinions of this Court to make it clear that the prohibition applies equally to absent citizens and to absent non-residents. (e. g. *Moss* v. *Fitch*, 111 S. W. 475, 479; *Raher* v. *Raher*, 129 N. W. 494, 500-501; *De la Montanya* v. *De la Montanya*, 44 Pac. 345, 347-348). The dissenting opinion in *Raher* v. *Raher*, *supra*, supplied the Texas Supreme Court with its repudiated doctrine of Sovereign Control. (*Raher* v. *Raher*, 129 N. W. 494, 502; *Mabee* v. *McDonald*, 175 S. W. 676, 692).

Respondent's Erroneous Classification of Petitioner's Cases.

Under the heading which will receive later separate attention:—"Appellant fails to see that this proceeding is one *quasi in rem*, or *in rem*, and not *in personam*", is a numbered classification of certain of the cases cited by us which not only has no relationship to the proposition it is supposed to support, but which is so grossly misleading that we cannot allow it to pass unchallenged (R. B. 25-27).

It first classifies *Schooner Exchange Co.* v. *M'Faddon*, 7 Cranch. 116 (1812) as recognizing that sovereigns have extraterritorial power (R. B. 25-26). If it is meant that the case holds that sovereigns, *in the absence of consent, may exercise* power within the territory of other sover-

eigns, respondent might have rested its defense of the subpoena. But respondent did not mean that, and what is meant cannot be imagined in the light of Chief Justice Marshall's words:

> (7 Cranch. 136) "All exceptions, therefore, to the full and complete power of a nation within its own territory must be traced up to the consent of the nation itself. *They can flow from no other legitimate source*". (Our italics).

This court had already applied the principle in *Glass* v. *The Sloop Betsey,* 3 Dallas 6 (1794), a case apparently involving the exercise of admiralty jurisdiction in this country by French consuls over French citizens. This court said:—

> (3 Dallas 16) "And the said Supreme Court being further of opinion that no foreign power can of right institute or erect, any court of judicature of any kind, within the jurisdiction of the United States, but such only as may be warranted by, and be in pursuance of treaties, it is therefore decreed and adjudged that the admiralty jurisdiction, which has been exercised in the United States by the consuls of France, not being so warranted, is not of right".

The divisions of respondent's classification numbered 2, 3, 4 and 5 (R. B. 26) seem to drive to the point that the bar on extraterritorial exercise of power may be lifted by statute.

This court in *Minder* v. *Georgia,* 183 U. S. 559, approved the following:—

> (p. 562) "nor can we see how a person is deprived of life or liberty without due process of law on account of not having the benefit of the testimony of witnesses (absent non-residents) who are beyond the jurisdiction of the court, *when the law-making power of a state is powerless to make any provision which would result in the compulsory attendance of the witnesses,* * * *". (Our italics and parenthesis).

In *Toland* v. *Sprague*, 12 Peters 300, this court said:—

> (pp. 329, 330) "as to all those (absent citizens) who were not within the United States, it was *not in the contemplation of Congress* that they would be at all subject, as defendants, to the process of the circuit courts, which, by reason of their being in a foreign jurisdiction, could not be served upon them; *and, therefore, there was no provision* whatsoever made in relation to them". (Our italics and parenthesis).

The opinion went on to double-rivet the point:—

> (p. 330) "* * * but upon the principle which we have stated that Congress had not those in contemplation at all, who were in a foreign jurisdiction, it is easy to perceive why the restriction in regard to the process was confined to the United States. *Plainly because it would not have been necessary or proper to apply the restriction to those whom the legislature did not contemplate, as being within the reach of the process of the court, either with or without restrictions.*" (Our italics).

Whether the bar on extraterritorial exercise of power may be lifted by statute depends, of course, upon whether the bar exists by virtue of constitutional limitations. *Pennoyer* v. *Neff*, 95 U. S. 714, reasoned the invalidity of a service by publication from *the root principle* (p. 721) —"*that no state can exercise direct jurisdiction and authority over persons or property without its territory.*" The violation in that case of the root principle deprived the court of jurisdiction, and judicial procedure without jurisdiction was declared a violation of due process (pp. 733, 734).

The root principle dominates every case classified by respondent in the numbered divisions above referred to. For example, *Picquet* v. *Swan*, 5 Mason 35, (C. C. U. S. Mass. Op. by Mr. Justice Story, 1848), states it even more broadly, as follows:

(p. 40) "* * * a court created within and for a particular territory is bounded in the exercise of its powers by the limits of such territory. *It matters not whether it be a kingdom, a state, a county, or a city, or other local district. If it be the former, it is necessarily bounded and limited by the sovereignty of the government itself, which cannot be extraterritorial; if the latter, then the judicial interpretation is, that the sovereign has chosen to assign this special limit, short of his general authority*". (Our italics.)

The root principle, in one form or another, was also applied to federal judicial districts, to the states, to the United States, to foreign countries, to absent citizens and to absent non-residents in the following cases: *Galpin* v. *Page,* 18 Wall. 350; *Minder* v. *Georgia,* 183 U. S. 559; *Harkness* v. *Hyde,* 98 U. S. 476; *Wilson* v. *Seligman,* 144 U. S. 41; *Bischoff* v. *Wethered,* 9 Wall. 812; *Roller* v. *Holly,* 176 U. S. 398; *Freeman* v. *Alderson,* 119 U. S. 185; *Baker* v. *Baker,* 242 U. S. 394; *Overby* v. *Gordon,* 177 U. S. 214; *Brown* v. *Fletcher's Estate,* 210 U. S. 82, 89; *Michigan Trust Company* v. *Ferry,* 228 U. S. 346; *Cooper* v. *Reynolds,* 10 Wall. 308; *Toland* v. *Sprague,* 12 Peters 300; *Robertson* v. *Railroad Labor Board,* 268 U. S. 619; *Glass* v. *The Sloop Betsey,* 3 Dallas 6; *McDonald* v. *Mabee,* 243 U. S. 90.

The principle inheres as a limitation on equal, independent sovereignties, and, because this nation is an equal, independent sovereignty under the Constitution, it is a constitutional limitation; it is firmly imbedded in the decisions of this court; it has the specific protection of due process; it is beyond the power of Congress to destroy.

Respondent's divisions numbered 6 and 7 (R. B. 27) classify *Bischoff* v. *Wethered,* 9 Wall. 812, and *Glass* v. *The Sloop Betsey,* 3 Dallas 6. The former is said to have no bearing on allegiance and the duties of absent citizens. Respondent is quite right. No decision of this court ever

approved allegiance as a substitute for service of process or appearance in acquiring personal jurisdiction over our citizens, nor has this court ever authorized exercise of power "beyond the jurisdiction of the United States", on the ground of allegiance.

The case does, however, have bearing in connection with *Glass* v. *The Sloop Betsey, supra,* for the two taken together close the door to extraterritorial exercise of power in this country by foreign nations over their own citizens and over the citizens of this nation. *The limitation is reciprocal among equal, independent sovereignties.*

Respondent's Irrelevant Propositions Urged in Support of the Subpoenas' Validity.

The remainder of respondent's answer in defense of the subpoena consists of the utterly irrelevant propositions that: (a) The service of the subpoena is *quasi in rem* or *in rem;* (b) The service of the subpoena is *sui generis;* (c) No special form of procedure or notice is required; (d) Under the English common law subpoenas could be validly served abroad; (e) Subpoenas may be served abroad because citizens abroad may be taxed in United States on their incomes earned abroad, and because citizens may be punished in the United States for their crimes committed abroad; (f) Because Congress may extend process from one federal district into another, it may extend process into foreign countries.

We shall give these arguments brief, separate attention:

The in rem or quasi in rem theory—(R. B. 25-27).

In rem procedure concerns itself with adjudication of rights to property within the territorial jurisdiction. *Quasi in rem* procedure premises itself upon the attachment of property within the territorial jurisdiction.

Cooper v. *Reynolds,* 10 Wall. 308. The issuance and service of the subpoena under the Act have no relation to property or to its attachment, or to whether or not a desired witness owns property. It is issued to compel testimony—it has no relation to the adjudication *of anything* respecting the desired witness. The subpoena (under Section 2) is issued out of a criminal action. It is not until the desired witness disobeys the subpoena that *quasi in rem* or *in rem* procedure is resorted to for his punishment. If there were such a thing as valid *quasi in rem* punishment procedure it could not carry back to validate an invalid subpoena, and if the subpoena is invalid there can be no punishment by *quasi in rem,* or *in rem* procedure, or otherwise. *Ex parte Fiske,* 113 U. S. 713, 718. (See also *United States* v. *Shipp,* 203 U. S. 563, 573; *Ex parte Rowland,* 104 U. S. 604; *In re Sawyer,* 124 U. S. 200). The classification of authorities which is supposed to support respondent's theory now under discussion (R. B. 25-27) has already received attention (this brief, pp. 15-19). Suffice it to say for present purposes that not a single case classified gives the slightest support to respondent's notion that the extraterritorial service of a witness-subpoena is a proceeding *in rem* or *quasi in rem.*

The sui generis theory—(R. B. 29-32).

Respondent again confuses the contempt proceeding with the service of the subpoena. Whether or not the contempt proceeding is *sui generis* can have nothing whatever to do with the only question which now concerns us, to-wit, whether the subpoena, provided by a special Act in derogation of the common law and hence not *sui generis,* and issuing out of a proceeding in no way connected with the contempt proceeding, is valid or invalid. If the subpoena is invalid, the subsequent contempt proceeding is invalid, and it makes no difference how we label it. *Ex parte Fiske,* 113 U. S. 713, 718.

The theory that no special form of procedure or notice is required—(R. B. 33-34.)

The cases cited and quoted from make it clear that the notice referred to is the notice which must be given to a person charged with contempt. There is no question of contempt until after the subpoena has been disobeyed in the independent criminal action out of which it issued. Not until then does it become pertinent to inquire as to the requisites of a valid notice. The subpoena under the Act is a command to appear and testify (Act, sec. 2). It is not, therefore, a notice of an offense, and advice as to what constitutes such notice cannot be relevant under a point dealing exclusively with the validity of the subpoena.

The alleged precedent of English Crown subpoenas—(R. B. 18-19).

As to the English common law and Acts of Parliament providing contempt punishment in connection with the recall of absent English citizens, to which respondent cites *Bartue and Duchess of Suffolk's Case,* 2 Dyer's Rep. 176, b. 73, Eng. Reprint 383, and *Knowles* v. *Luce,* Moore's Rep. #(K. B.) 109, 72 Eng. Reprint 473: As was pointed out in our main brief (pp. 28-29): (1) English common law and English Crown powers are not important here for the reason that at the time of the first Judiciary Act, and before that, American common law (and due process in this country) required that *judicial jurisdiction in personam* must be acquired by appearance, or service at a place where the serving officer has authority to execute a writ of summons. *Robertson* v. *Railroad Labor Board,* 268 U. S. 619; (2) the recall of the absent citizens of England in those cases was by direct order of the Crown, not by a court, and the contempt was contempt of the Crown, not of the court. The right to recall was a Crown power resting on ancient prerogative (*Knowles*

v. *Luce, supra*), and therefore, the right, to the extent it exists in this country, reposes in the legislative or executive branches of our government. The right has never been claimed or exerted by the judiciary; it is not a judicial power, and hence Congress under the Constitution could not confer it upon the judiciary. *Fed. Radio Commission* v. *General Elec. Co.*, 281 U. S. 464; (3) the procedure in the *Bartue* and *Knowles* cases, *supra*, savored of outlawry which violates the rudimentary conception of the fundamental rights of the American citizen. *Hovey* v. *Elliott*, 167 U. S. 409, 444. Many arbitrary practices authorized by the omnipotent English Parliament were not regarded as inconsistent with the law of the land in England. In this country, written constitutions were adopted to protect the rights and liberties of the people against encroachment by their governments. *Hurtado* v. *People of California*, 110 U. S. 516.

The alleged precedent from tax cases—(R. B. 19-21).

Respondent cites *Cook* v. *Tait*, 265 U. S. 47, (1924): There is nothing in the case on the reach of process. Tait, the collector, was sued *in this country* by Cook, the taxpayer. Tait, the defendant collector, raised no question as to the manner in which jurisdiction *in personam* had been acquired over him. There is no revenue law which authorizes, and there is nothing in the *Cook case* which affirms the validity of process served "beyond the jurisdiction of the United States", or the validity of any other form of power exercised in foreign countries.

The alleged precedent of cases punishing citizens in the United States for their crimes abroad—(R. B. 21-25).

Respondent's statement of the proposition, including the element of punishment "in the United States" condemns it as irrelevant. We do not deny that citizens apprehended *in the United States* or *brought into the United States* may be punished *in the United States* for

offenses committed elsewhere. The point is: No officer can put his foot on foreign soil to arrest the offender without the consent of the foreign nation, and jurisdiction *in personam* cannot be exercised over the offender until he is found or brought within the territorial jurisdiction of the United States. (See cases cited in our main brief, p. 28). The inexorable character of the limitation is emphasized by the fact that (without treaties) this nation, even in time of war, cannot send its officers into foreign countries to round up absent citizens for military service. *Crapo* v. *Kelly*, 83 U. S. 610. All of our extradition treaties furnish further evidence to the same effect.

The alleged precedent from the reach of process within the United States—(R. B. 32-33).

Respondent argues (R. B. 32) that "process of a court may extend by legislative authority from one district to another", to which is cited *Big Vein Coal Company* v. *Read*, 229 U. S. 31; *Mellen* v. *Moline Iron Works*, 131 U. S. 352; U. S. C. Tit. 28, *Judicial Code and Judiciary*, Chap. 2, Par. 26. We thoroughly agree, but neither the proposition nor the authorities cited in its support have anything to do with the reach of original personal process into countries "beyond the jurisdiction of the United States", which, we repeat, is the only matter now pertinent for discussion.

Respondent then draws the conclusion that "likewise process of court may be extended by Congress to foreign countries" (R. B. 33); in other words, because Congress has power to authorize process to extend *throughout the United States*, it has power to authorize process to extend *throughout the world*. A patent *non sequitur*.

Respondent cites *Perez* v. *Fernandez*, 220 U. S. 224, a case under *Sec. 57 of the Judicial Code*, which relates exclusively to pure *in rem* actions in which jurisdiction attaches to the property *within* the territorial jurisdic-

tion of the federal court, and that which the absent person receives is a notice (described as such in Sec. 57) of the action *in rem* which cannot be the basis of jurisdiction *in personam*. This has been expressly declared in *Section 57* cases. See, for example, *Grable* v. *Killits*, 282 Fed. 185, 193 (C. C. A. 6th Circ. 1922; citing *Pennoyer* v. *Neff, supra*); *General Inv. Co.* v. *Lake Shore & M. S. Ry. Co.*, 250 Fed. 160, 178-179 (C. C. A. 6th Circ. 1918).

If the distinction needs to be made clearer, we can only repeat that the desired witness under the Act must be "beyond the jurisdiction of the United States"; that the subpoena has no relation to property within the jurisdiction of the United States; that it is a purely personal command to the desired witness issuing out of an action to which the desired witness is not a party; that the present question *does not* go to the validity of a notice of an action respecting a subject-matter *within* the United States, but that *it does go* to the method of acquiring personal jurisdiction over a citizen *outside* of the United States.

Summary of Reply A.

It is apparent, we respectfully submit, that the arguments of respondent here rest—(a) on narrow, more than counter-balanced arguments of expediency; (b) on theories as to the acquisition of jurisdiction *in personam* repudiated by this court as violative of due process, and by the express terms of the special Act in question in derogation of the common law; (c) on quibbling distinctions as to whether the consul exercises sovereign or ministerial power, urged in the face of this court's declaration that *any power* exercised by consuls without authority of treaty, is invalid; (d) on patent irrelevancies, such as—that the subpoena authorized by a special Act of Congress is *sui generis*, that it is process *in rem* or *quasi in rem*, although entirely unconnected with attach-

ment of, or jurisdiction over, property; that the subpoena is a notice of an offense, although there can be no offense until after the subpoena has been validly served and disobeyed; that because the reach of process of federal courts may be extended by Act of Congress into all districts within the United States, it may be extended by the same means throughout the world.

Certainly it is difficult, with all due respect we say it is impossible to reconcile such vagaries with *Schooner Exchange* v. *M'Faddon, supra,* which declared that an equal sovereign, in the absence of consent, is incapable of conferring extraterritorial powers, with *Toland* v. *Sprague, supra,* which declared that because process could not be served extraterritorially it could not be in the contemplation of Congress to authorize its extraterritorial service, with *Pennoyer* v. *Neff, supra,* and all of the cases which have followed it, which declared that extraterritorial exercise of judicial jurisdiction violates due process, with *McDonald* v. *Mabee, supra,* which declared that methods of acquiring jurisdiction *in personam,* to comply with due process, must not lose sight of the fact that jurisdiction is power, is the power to seize, with *Robertson* v. *Railroad Labor Board, supra,* and numerous other cases of this court which declared that jurisdiction *in personam* must be acquired by valid service of process or by voluntary appearance.

The cases at bar, on the validity of the subpoena alone, fit perfectly the ground which this court has said may be urged for review of certiorari, to wit, that the lower court "did not give proper effect (it gave no effect) to applicable decisions of this court". (Our parenthesis.)

REPLY B.

Act Does Not Provide Valid Jurisdiction to Punish.

Respondent confuses the essentially simple nature of the point now under discussion by incorporating, by reference, its arguments urged in support of the validity of the subpoena (R. B. 35). The validity of the subpoena and the validity of the punishment procedure each involves different theories, bound up in due process, for the acquisition and maintenance of jurisdiction. The subpoena, issuing and served without reference to money or other claims against the desired witness, without reference to "offending property", or attachment of property, or claims of any kind to or with respect to property—having nothing whatever to do with property, representing a purely personal command with respect to the purely personal matter of testifying, involves the question: Does the Act provide a due process method for acquiring jurisdiction *in personam* over the desired witness?

Of course, if the Act provides the same method for acquiring jurisdiction to punish disobedience of the subpoena as it does to acquire jurisdiction to command the testimony of the witness, the arguments urged for the validity of the subpoena apply equally to the validity of the punishment procedure.

But this is not the case. The Act contemplates that jurisdiction to punish shall be acquired by *quasi in rem* or *in rem* methods, as is shown by the facts—(1) there is no requirement that the defendant *must* be served with the citation to appear, (2) there is no requirement that the service of the citation *must* be proved, (3) a judgment under the Act may be had *"upon service by publication only"* (Act, sec. 8), (4) the Act makes attachment of property followed by publication of the citation a mandatory condition precedent to the punitive proceedings

(Act, sec. 6), (5) the court below held that the punitive proceedings are *quasi in rem* (R. 5131, p. 99, R. 5132, p. 95); respondent says they are *quasi in rem* or *in rem* (R. B. 35). The question thus presented under the present point is: Does such *quasi in rem* or *in rem* method of acquiring jurisdiction to punish satisfy the requirements of due process?

The obvious distinctions between jurisdiction *in personam* and jurisdiction *in rem* or *quasi in rem*, require that the jurisdictional question involving the subpoena and the jurisdictional question involving the punishment procedure, be considered separately, and recognition of these distinctions condemns respondent's commingling of argument.

By re-examining the contentions of respondent urged in support of the subpoena and having to do in fact with respondent's theory of the nature of the punishment procedure, it will be found that the position of the court below is unaffected except that respondent adds the idea in the alternative, that the punishment procedure is also *in rem*. The matter from the viewpoint of the court below and of respondent combines into the following: (a) the punishment procedure is *in rem;* (b) the punishment procedure is *quasi in rem;* (c) the judgment is completely satisfied out of the attached property; (d) the punishment procedure is *sui generis*, and, therefore, due process is accorded if defendant is advised of the charges and has opportunity to present his defense by witnesses and argument.

As to the *sui generis* theory: We have already made the point that the procedure cannot be *sui generis* because it is *express* procedure provided by the provisions of the special Act; that the Act is in derogation of the common law and must, therefore, be strictly construed according to its terms (our main brief, p. 33):

The express procedure of the Act is *in rem* or *quasi in rem*, and hence it cannot be *sui generis*. Furthermore, *sui generis* procedure exists by virtue of the inherent

power of our federal courts to protect their existence under the Constitution (*Michaelson* v. *United States*, 266 U. S. 42, 65-66; *Ex parte Grossman*, 267 U. S. 87, 117-118), from which it follows that if the procedure were not *in rem* or *quasi in rem*, it could not be *sui generis* for the reason that it is designed to acquire jurisdiction to punish failure to obey subpoenas served in foreign countries, and *no federal court ever claimed such power to be inherent.* Respondent admits this when it says (R. B. 35): "Of course, this proceeding is based upon the Act of July 3, 1926. *We concede that without this legislation it could not be maintained.*" (Our italics.)

As to respondent's contribution that the procedure is *in rem;* There is some warrant for this notion. *Sec. 8* of the Act provides for reopening judgments by following the *in rem* procedure of *Sec. 57 of the Judicial Code.* Respondent probably reasons that if *in rem* procedure is intended to reopen the judgment, it is intended also to give jurisdiction for the procedure leading to judgment.

In rem procedure, however, wherein the pleadings, the issues, the trial, the judgment and its satisfaction exclusively concern and directly affect property, works no greater magic than *quasi in rem* procedure discussed in our main brief (pp. 31-32). Testing *in rem* procedure against the facts of the Act, against that which the Act directs shall be accomplished, it will be noted: (a) Under the Act, the punitive procedure is commenced by a charge "of the service and default" of a personal witness-subpoena (Act, sec. 4). There is nothing in the Act authorizing the charge of a property matter; (b) Under the Act, the citation to appear, which issues after proof "of the service and default" of the personal witness-subpoena, contains the direction to the disobedient person to appear and show cause why he should not be adjudged guilty of contempt and be punished accordingly (Act, sec. 4). There is nothing in the Act which authorizes a citation to the disobedient person to appear and show

cause why property questions should not be adjudicated: (c) Under the Act, property is attached to satisfy a possible personal fine, if it should not be paid, as punishment for the personal contempt (Act, secs. 5, 7). There is nothing in the Act which provides that property shall be seized to satisfy a judgment respecting property disputes; (d) Under the Act, on the return day of the citation to appear, proof shall be taken on the personal issue of "recusancy" (Act, sec. 7). There is nothing in the Act to authorize proof as to the guilt of property or as to property disputes; (e) Under the Act, if the charge of "recusancy" shall be sustained, the court shall adjudge the defendant guilty of contempt and impose upon him a fine not exceeding one hundred thousand dollars (Act, sec. 7). There is nothing in the Act authorizing a judgment of guilt against property, or a judgment respecting disputed title or claims to property; (f) Under the Act, if the defendant does not pay his fine, the amount thereof shall be satisfied out of the property previously attached (Act, sec. 7). *There is nothing in the Act authorizing satisfaction out of the attached property of a pre-existing property claim. There is nothing in the Act providing that the attached property shall satisfy the personal judgment of guilt of contempt, which, therefore, must remain perpetually effective and unsatisfied. There is nothing in the Act to wipe out the judgment of guilt after the fine has been made out of the property. There is nothing in the Act which declares that making the fine out of defendant's property shall change the fine from a personal punishment to a punishment of property.*

Respondent admits the offense is criminal contempt of court (R. B. 37). Criminal contempt of court is a crime, is a personal criminal offense. The fundamental characteristics of other criminal cases and of criminal contempts are the same. *Michaelson* v. *United States*, 266 U. S. 42, 66-67 (1924; Op. by Mr. Justice Sutherland); *Ex parte Grossman*, 267 U. S. 87, 115-116 (1925; Op. by Mr. Chief Justice Taft). There is no such incon-

gruous, absurd thing known to the law as a personal criminal offense *in rem* or *quasi in rem*. Procedure against an individual for punishment of a personal offense affords perfect illustration of an action *in personam*.

A defendant violates the *National Prohibition Act* (or any other criminal statute), is found guilty, is fined $1,000. Is the judgment of guilt any less personal, is the fine any less personal, is the crime, is the trial any less personal, because the defendant fails to pay the fine and the marshal makes it by execution on the defendant's property seized *subsequent* to the judgment? The defendant, under the *Act of July 3, 1926*, is adjudged guilty of the personal criminal offense of contempt of court. Is the judgment any less personal, is the fine any less personal, is the crime, is the trial any less personal, because the marshal, instead of making the fine, as in the former case, out of defendant's property seized after the judgment, makes it out of defendant's property already in his hands? In reason and common sense, how can this difference *in what the marshal does* alter the personal character of the crime, the trial or the punishment? Is the fine or the judgment of guilty any less a personal punishment, is the crime or the trial any less personal because the fine is paid out of the defendant's property *instead of directly out of his purse* (as may be done under the Act, sec. 7)?

It must be clear that under the terms of the Act, and under any sane purpose attributed to the Act, the charge is the charge of a personal criminal offense; the issue and trial concern the defendant's personal guilt or innocence of that personal criminal offense; the judgment is a personal judgment of guilt or innocence of that personal criminal offense, with personal punishment of a fine, if guilty.

Rem, or *quasi in rem* procedure under the Act, therefore, is an artificial, arbitrary device for evading the re-

quirement of due process that jurisdiction *in personam* must be acquired by voluntary appearance or by service of process within the territorial jurisdiction of the serving officer (see our main brief, pp. 25-26), and possibly for introducing into our law the dubious benefits of outlawry. This court has repeatedly held that the label will not alter the substance; that fiction cannot substitute for the fair play of facts; that the arts of lexicography will not be permitted to alter the essential nature of a thing. *McDonald* v. *Mabee*, 243 U. S. 90-91; *United States* v. *La Franca*, 282 U. S. 568, 572 (1931; Op. by Mr. Justice Sutherland).

REPLY C.

Act Does Not Provide for Notice of the Offense or the Claim Against the Property.

We contend that the Act does not require actual or any other notice to the accused of the facts constituting his offense or of the government's claim against his property, and hence violates due process under the Fifth Amendment of the Constitution. Although squarely presented with this point, the court below ignored it entirely and confined its discussion of notice to whether in fact petitioner received notice in the cases at bar (R. 5131, pp. 98-99; R. 5132, pp. 94-95). Because respondent also stresses what it thinks was procedural notice afforded petitioner in the cases at bar (R. B. 35-36), we shall restate our position in order to avoid the slightest reason for further confusion of the matter.

1. The point now under discussion goes exclusively to the constitutionality of the Act. It does not go to the lack of procedural notice to petitioner in the cases at bar. The failure to furnish notice to petitioner is the subject of our procedural points H-b and H-c, our main brief, pp. 42-44, this brief, pp.

2. The Act does not require notice of the facts constituting the offense or the claim against the accused's property, as is shown by the following:

After the accused has disobeyed the command of a subpoena, there are only two matters, under the provisions of the Act, which can possibly come to his attention —(a) the *mandatory* publication of the citation to appear and show cause (Act, sec. 6); (b) the service (*not mandatory*) of the citation to appear and show cause (Act, secs. 6, 8).

There is no provision that the citation to appear shall include specification of the offense or the claim against the property. Neither the court below nor respondent has made any claim to the contrary. *The citation, under the Act, is a command to attend a general inquiry on an unspecified contempt* (Act, sec. 4).

The word "contempt" which must be included in the citation, connotates all of the innumerable possible obstructions of justice. It is not limited to the service and default of a particular witness-subpoena, or of a witness-subpoena under the Act. We have seen that a general citation to appear at a general inquiry is not a notice of specific charges (our main brief, p. 34).

If the citation to appear were intended by the Act to include specific charges against the accused and his property, it would be futile for the reasons: *First*—there is no provision for charging the desired witness with notice that the subpoena issued under the special Act (respondent admits this, R. B, 41), in the absence of which he is entitled to assume that it is a general subpoena issued under general law, and because served "beyond the jurisdiction of the United States", is void. *Second*—there is no provision requiring the punitive procedure to be identified with the Act. The witness, therefore, is entitled to assume that he is the object of a void proceeding to punish him for disobeying a void subpoena. *Third*—considering that under the Act there is no possibility of an "offending property" question; that at the

time of the attachment the Government has no money or property claim against the accused; that the presumption of innocence prevails,—it would be impossible to formulate anything but an arbitrary claim against the property.

3. The Act is special, is in derogation of the common law, must be strictly construed according to its terms, *"the conditions of its exercise over subjects or persons necessarily depend upon the terms in which the jurisdiction is granted"*, (*Galpin* v. *Page*, 18 Wall. 350, 372), and therefore, the Act must expressly authorize every step necessary for valid procedure under due process. This court and other federal courts have said that due process in contempt cases, not in the face of the court, requires that the accused shall be advised of the charges. *Cooke* v. *United States*, 267 U. S. 517, 537; that he should be clearly informed of the charges against him, and whether a civil or criminal contempt is alleged. *Schwartz* v. *United States*, 217 Fed. 866, 868 (C. C. A. 4th Cir. 1914); that the contemnor should have an opportunity to defend by informing him concerning the nature and particulars of the offense charged. *Stuart* v. *Reynolds*, 204 Fed. 709, 714 (C. C. A. 5th Cir. 1913); that the pleading, whether petition or information or other formal statement, by which the prosecution is initiated, should state completely the necessary facts constituting the offense, clearly apprising defendant of the nature of the charge against him and the acts which he will be called upon to meet. *Cyc. of Fed. Proc.*, Vol. 7, Sec. 3720 (citing many federal cases).

Due process requires notice of the claim against the property of the accused. In *Windsor* v. *McVeigh*, 93 U. S. 274, 279-280, this court said: "It is a rule, said the learned judge, (referring to the opinion of Mr. Justice Story, in *Bradstreet* v. *Neptune Ins. Co.*, Sumner 601) 'founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his de-

fense before his property is condemned, *and that charges on which the condemnation is sought shall be specific, determinate and clear'.*" (Our italics.)

4. This court has held that to comply with due process special acts authorizing the taking of a citizen's property must contain an express requirement that the owner shall receive notice. *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413. The notice must be "*specific, determinate and clear*"; that it must advise the owner of the nature of the claim against him and the relief sought from the court if the claim is sustained. *Windsor* v. *McVeigh*, 93 U. S. 274, 279, 280, supra; *In re Wood & Henderson*, 210 U. S. 246, 254, 255.

5. Since we know that the Act must provide for notice which accords with due process notice; since we know what that notice must be; since the Act makes no provision for it—the Act is invalid.

To the foregoing, respondent answers (R. B. 35-36): that petitioner had the privilege of learning what it was all about by examining the trial court's records; that the Act does not contain a provision for notice similar to that of the Clayton Act which requires that a copy of the affidavit or information shall accompany the citation to appear and show cause; that here Congress authorized a different procedure; that Congress has the power to modify the form of procedure in contempt cases; that procedurally in the cases at bar petitioner received notice; that petitioner talked the Act over with his counsel; that the Constitution is silent as to the form of notice; that petitioner is estopped to deny that he received notice in the cases at bar (R. B. 35-36).

We must say, with all due respect to able and eminent counsel for respondent, that the court below accomplished as much by saying nothing.

Respondent's argument reverses due process by proceeding on the theory that instead of receiving proper notice, under the mandate of the statute, the defendant

must seek it out and serve himself. It is just another way of saying that proper notice need not be required. *Coe* v. *Armour Fertilizer Works, supra*, emphatically emphasizes that gratuitous notice, self-served notice, do not substitute for the due process requirement that the statute shall expressly provide for notice.

As to the suggestion of respondent that Congress has the power to modify the form of procedure in contempt cases: We do not say that the form of notice need be detailed in the Act. We do not care anything about the *form* of the notice. We do not say that the Act must require that the notice should be included in the body of the citation to appear, or should be included in an annex or in accompanying affidavits, or in any other particular way. Our contention is that this special Act in derogation of the common law prescribing a criminal offense and attachment and sale of the property of the accused, must provide *in some way, in some form,* for notice to the accused of the facts constituting his alleged offense and the claim against his property. Respondent does not argue the existence of such provision, and thereby admits all facts necessary to invalidate the Act.

REPLY D.

Search and Seizure Authorized by Act Violates Fourth Amendment.

Respondent says there is no word in the record showing "any unreasonable search", or any search in fact (R. B. 36). We are not attacking the *manner* in which the marshal executed his orders in the cases at bar. We are attacking the Act because no search and seizure under its provisions, no matter how nicely executed, could possibly be other than unreasonable. The finesse of the marshal cannot cure the vice of the Act. We stated the grounds in our main brief (p. 36).

Respondent says the Act provides for a levy and seizure, and nothing more (R. B. 36). We assume this statement is to carry the implication that the Act does not require a search. *Section 5* of the Act provides that the court shall direct "that the property of the recusing witness, at any place within the United States, * * * shall be levied upon and seized by the marshal" of the court. The Act does not provide any method whereby the property of the accused shall automatically find its way into the marshal's hands; does not provide for levy and seizure of property which does not have to be searched for; does not provide that the court shall designate the property or the place where it shall be seized; does not limit the levy and seizure to real property—any kind of property will do. The only boundaries to the place of levy and seizure are the boundaries of the United States (Act, sec. 5). How, therefore, can the marshal carry out the order of the court unless he searches for property of the accused and unless he levies upon and seizes the property wherever he may find it within the United States?

A general search is the precise thing authorized by the Act (a general search was the precise thing authorized in the cases at bar, R. 5131, p. 12, R. 5132, p. 11). General searches violate the *Fourth Amendment*. The recently decided case of *Go-Bart Co.* v. *United States*, 282 U. S. 344 (1931; Op. by Mr. Justice Butler), summarizes the law on the subject as follows:

> (p. 357) "*It* (first clause of the Fourth Amendment) *is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders, as well as the innocent,* and unquestionably extends to the premises where the search was made and the papers taken. *Gouled* v. *United States*, 255 U. S. 298, 307. The second clause declares: 'and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized'.

> This prevents the issue of warrants on loose, vage, or doubtful bases of fact. *It emphasizes the purpose to protect against all general searches.* Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty, they are denounced in the constitutions or statutes of every state of the union. *Agnello* v. *United States,* 269 U. S. 20, 33. The need of protection against them is attested alike by history and present conditions. *The amendment is to be liberally construed,* and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. *Boyd* v. *United States,* 116 U. S. 616, 623. *Weeks* v. *United States, supra,* 389-92. *There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances.*" (Our parenthesis and italics.)

The general search, condemned in the *Go-Bart case, supra,* was made for the purpose of finding incriminating evidence. But the prohibition of the *Fourth Amendment* against unreasonable searches and seizures is not limited to searches and seizures for incriminating evidence. This was made clear in the *Boyd case,* 116 U. S. 616, where it was pointed out (pp. 623-630) that Writs of Assistance crystallized the sentiment culminating in the *Fourth Amendment,* and that such writs were not used to gather evidence to incriminate, but for the purpose of finding prohibited imports, or to find imports upon which duties had not been paid. The *Fourth Amendment* prohibits "every search that is unreasonable". It "emphasizes the purpose to protect against *all* general searches". *Go-Bart case, supra.* Moreover, it is rather difficult to distinguish in reasonableness between searches to incriminate and searches to find property for establishing a jurisdiction without which there could be no crimination.

Respondent says petitioner is a man of large affairs and that he ignored the orders of the court in a case of

large importance to the Government (R. B. 37). What has that to do with whether the Act provides for unreasonable searches and seizures? The *Fourth Amendment* draws no distinctions between persons of large and small affairs, or between cases of large or small importance to the Government. The *Go-Bart case, supra,* reaffirmed the established rule of this court that the Fourth Amendment "protects *all,* those suspected or known to be offenders, as well as the innocent".

Respondent says this court will not set aside a fine unless it is so grossly excessive as to amount to deprivation of property without due process of law (R. B. 37). What of it? We are not attacking the provisions of the Act providing for the imposition of a fine on the ground of excessiveness. For the reasons pointed out in our main brief (p. 36), we say the search and seizure authorized by the Act cannot possibly have a reasonable relationship to the fine regardless of its size. Perhaps respondent considers the search and seizure under the Act to be in the nature of a punishment. If so, we reply that such theory can only add to the unreasonableness of a search and seizure made prior to conviction and while the presumption of innocence obtains. Even the ancient Crown right to forfeit the goods of a felon did not attach until after conviction. *The Three Friends,* 166 U. S. 1, 50-51.

REPLY E.

Act Violates Due Process Because It Authorizes Trial and Judgment in the Entire Absence of Defendant Without His Consent.

Respondent reminds "the petitioner that this is a proceeding for punishment for criminal contempt and not for a crime", that "the procedure adopted was a substantial, if not a literal compliance with the statute"

(R. B. 37). Petitioner reciprocates the reminder that this court has held that criminal contempt of court is a crime, is a criminal offense. *Michaelson* v. *United States*, 266 U. S. 42, 66-67; *Ex parte Grossman*, 267 U. S. 87, 116.

Since petitioner was tried and adjudged guilty of criminal contempt in his entire absence and without his consent (T. R. 5131, pp. 67-68, 73, 84; T. R. 5132, pp. 51-52, 57, 81), we think it correct to say that the procedure (in this respect) adopted in the cases at bar complied with the statute. Whether or not the statutory authority for such procedure is valid, is the matter now under consideration.

Viewing the trial as an *in rem* or *quasi in rem* procedure, respondent naturally does not linger on the principle of criminal proceedings, as old as the law itself, that for jurisdiction to proceed the accused person must be in the power and under the control of the court in his person. *Holdsworth His. Eng. L.* (3d ed.), vol. II, p. 105; vol. III, p. 605; *Lambard Eirenarcha* (1607), p. 512; *2 Hale Pl. Cr.*, 1st Am. ed. (1847) 208, note citing *Com. Dig. Process*, A. 1.

Lewis v. *United States*, 146 U. S. 370

> (p. 372) "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. While this rule has, at times and in the cases of misdemeanors, been somewhat relaxed,
>
> Note—Principal relaxation is that defendant *may consent* to trial in his absence. See *United States* v. *Shelton*, 6 Fed. (2d) 897; *United States* v. *Mayo*, 26 Fed. Cas. 1230, Case No. 15754).
>
> yet in felonies it is not in the power of the prisoner either by himself or his counsel, to waive the right to be personally present during the trial." (Our note.)

Ex parte Terry, 128 U. S. 289

The precise question was:

> (p. 311) "Whether the petitioner's retirement from the court room into another room of the same building, after he had been guilty of misbehavior in the presence of the court, and had violently obstructed the execution of its lawful order, *defeated the jurisdiction which it possessed, at the moment the contempt was committed, to order his immediate imprisonment* without other proof than that supplied by its actual knowledge and view of the facts, and without examination or trial in any form?"

This court said:

> (pp. 311-312) "If, in order to avoid punishment, he had absconded or fled from the building, immediately after his conflict with the marshal, the court, in its discretion, and in the circumstances rendered proper, could have ordered process for his arrest and given him an opportunity, before sending him to jail, to answer the charge of having committed a contempt. But in such a case the failure to order his arrest, and to give him such opportunity of defence would not affect its power to inflict instant punishment. *Jurisdiction to inflict such punishment having attached while he was in the presence of the court,* it would not have been defeated or lost by his flight and voluntary absence." (Our italics.)

How could this court make it clearer that direct control over the defendant must be acquired at some stage of the proceeding before he can be sentenced for criminal contempt of court?

A trial in the entire absence of the accused, in a misdemeanor case, is absolutely contrary to all general principles and practice and is illegal, null and void. *United States* v. *Shelton*, 6 Fed. (2d) 897, 899. Due process is a course of legal proceedings according to those rules and principles which have been established in our

systems of jurisprudence for the protection and enforcement of private rights. *Pennoyer* v. *Neff*, 95 U. S. 714, 733.

To justify trial and judgment in the absence of defendant, and without his consent, respondent argues that Congress, within limits not precisely defined, may regulate the inherent power of courts to punish contempt (Re B. 37).

Legislative sanction of trials *in absentia* is not a regulation of an inherent power of courts for the reason that courts have never claimed, in fact, have negatived the existence of such inherent power. That federal courts do not and will not claim such power to be inherent is, we think, amply evidenced by the lack of precedent for it (respondent does not cite a single case), and by the elaborate care which this court took in *Ex parte Terry, supra* (an inherent power contempt case), to make it clear that there was power to pronounce judgment on the absent defendant *by reason of his presence before the court when the contempt was committed.* If the inherent powers of federal courts cannot dispense with direct personal jurisdiction over a defendant who commits a contempt "in the face of the court," on what theory can those powers, or a "regulation" of them, excuse such jurisdiction when the defendant who committed the offense was "beyond the jurisdiction of the United States"?

It is not a regulation at all—it is an attempt by legislation to confer a new power, which, because it is not an inherent power essential to the preservation of the existence of the judiciary, should be subjected to the normal tests of due process.

Although admitting petitioner's reserved special appearances to challenge the constitutionality of the Act, and his objections to taking testimony in his absence (R. B. 37-38), respondent argues that because Mr. Battle took the stand to give testimony in mitigation of the offense charged, petitioner thereby made a general ap-

pearance and will not be permitted to urge the point under discussion. The contrary has been well established by this court (see cases, our main brief, p. 44). We add the recent decision in *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U. S. 522 (Prel. Print) 1931, Op. by Mr. Justice Roberts), wherein it was said:

> (p. 525) (special appearance) "would save the question of the propriety of the court's decision on the matter even though after the motion had been overruled the respondent had proceeded, subject to a reserved objection and exception, to a trial on the merits. *Harkness* v. *Hyde*, 98 U. S. 476; *Goldey* v. *Morning News*, 156 U. S. 518; *Toledo Rys. & Lt. Co.* v. *Hill*, 244 U. S. 49; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229; *Morris & Co.* v. *Skandinavia Ins. Co.*, 279 U. S. 405". (Our parenthesis)

As to the cases cited by respondent (R. B. 38): Since this court has spoken, we see no reason for wandering into other fields.

REPLY F.

Denial to Accused in Criminal Prosecutions of Right to Compulsory Process.

Respondent says—"The Sixth Amendment provides for compulsory process, but does not provide for equal process". (R. B. 38) No authorities are cited to support the statement. In *In re Dillon*, 7 Fed. Cas., pp. 710, 712 (Case No. 3914), the court said that the provisions of the Sixth Amendment for compulsory process—"were obviously intended to abrogate the harsh and tyrannical rules of the common law * * *, and to place the accused in a position to make his defense and establish his innocence by giving him *rights in all respects similar and equal* to those possessed by the government for establishing his guilt".

Respondent says that the defendant in criminal cases may have letters rogatory under *Section 1* of the Act and if the witness refuses to respond he may be subpoenaed. (R. B. 38-39) *Section 1* of the Act does not grant letters rogatory to defendants in criminal cases; does not contain any new grant of right to letters rogatory. The section merely contemplates cases in which it is normal and proper to issue letters rogatory. Letters rogatory do not issue in criminal cases, for the reason, among others, that such method of securing testimony rests on the offer of the tribunal issuing the letters to do the like in a similar case for the tribunal to which they go. *Greenleaf on Evidence* (Redfield's Ed.) Sec. 320. *Sec. 4071 R. S.* (U. S. C. tit. 28, Sec. 701) prescribes the conditions under which federal courts will summon witnesses to respond to letters rogatory issuing in the courts of foreign nations. One of the conditions is that the action in the foreign country must be a *"suit for the recovery of money or property"*. This excludes criminal actions. *In re Letters Rogatory from First District Judge of Vera Cruz,* 36 Fed. 306. Under the principle of comity above mentioned it is not proper for United States courts to ask for more, and they will not receive more, than they are permitted under our own law to offer to other nations.

Furthermore, it appears from the *Report of the House Committee on the Judiciary, No. 1313* (69 Cong. 1st Sess. May 26, 1926) pp. 1-3, that *Section 1* was intended by Congress to apply to civil cases only; that respondent's distinguished counsel, the Honorable Aflee Pomerene, advocated the inclusion of *Section 2* of the Act because it was desired to secure testimony in criminal cases.

In addition, the *Sixth Amendment* requires "compulsory" process. Letters rogatory are not compulsory process for the reason that the foreign court cannot be compelled to take a single step with reference to the letters. "We cannot execute our own laws in a foreign country, nor can we prescribe conditions for the perform-

nce of a request which is based entirely upon the comity of nations, and which, if granted, is altogether *ex gratia.*" *Union Square Bank* v. *Reichmann,* 41 N. Y. Supp. 602, 605, 9 App. Div. 596. Under the terms of the Act, if the foreign court, for any reason sufficient to itself, does not call the desired witness, there is no right to ask for a subpoena (Act, sec. 1).

Appellee contends that because a defendant may be deprived of equal rights of appeal he may also be deprived of equal compulsory process, citing *United States* v. *Heintz,* 218 U. S. 532. (R. B. 39) It seems to us that the complete answer is—(a) that the *Sixth Amendment* guarantees compulsory process, whereas neither the *Sixth Amendment* nor any other part of the Constitution expressly guarantees compulsory right of review; (b) under the Act, defendants in criminal actions are not granted equal, substantially equal, or any compulsory process.

REPLY G.

Arbitrary, Unreasonable, Capricious Character of Act.

Respondent says the Act is not unreasonable, arbitrary and capricious because it provides a method for the punishment "in part" of the defendant through seizure of his property. (R. B. 39) This is a new thought; it is outlawry which "violates the rudimentary conceptions of the fundamental rights of the citizen." *Hovey* v. *Elliott,* 167 U. S. 409, 444. It is a theory which assumes conviction in advance of trial and in the presence of the presumption of innocence obtaining in contempt cases. *Michaelson* v. *United States,* 262 U. S. 42, 66-67; *Gompers* v. *Bucks Stove and Range Co.,* 221 U. S. 418, 450-451. If a capstone to the unreasonable features of the Act were needed, respondent now supplies it with this musty and obnoxious doctrine.

Respondent suggests that it is not unreasonable to make the ownership of non-offending property a condition precedent to judgment of guilt of a purely personal criminal offense because there is no reason to let a guilty rich man escape just because a guilty poor man cannot be taken. (R. B. 39) No reason other than that the property of neither the rich nor the poor should be seized in advance of rightful claim thereto; other than the revulsion which many feel over demagogy even though sponsored by the Congress.

Respondent thinks there is analogy between this feature of the Act, and the right where it exists, to attach property within the jurisdiction of an absent debtor. (R. B. 40). Respondent overlooks the facts that the debtor alleges his debt at the time of the attachment; that under the Act the Government does not and cannot allege a debt at the time of the attachment; that the presumption of innocence in contempt cases excludes a money claim for a fine when the attachment is made.

PROCEDURAL POINTS.

Reply H-a*—No Proper Showing for Subpoenas.

Respondent argues that a verified "belief" is a "proper showing" and may be accepted by the court in the exercise of judicial discretion.

The verifications in the cases at bar went to "the facts set forth" (R. 5131, p. 3; R. 5132, p. 3). No facts

*Footnote: On page 10 of respondent's brief is an excerpt from one of petitioner's briefs in the trial court to the effect that the proceedings in 5131 were "taken in exact pursuance of the Act". This statement, more narrowly expressed than intended, was for the purpose of the motion to vacate,—in order to strip the argument which we then made of everything other than constitutional questions. It is clearly apparent from the record that such was the purpose of the statement. That petitioner had no intention of making it as an admission in the further progress of these causes is abundantly evident from the vigor with which every step of the proceedings was challenged (R. 5131, pp. 39-51, 52-58, 67-68, 72-85; R. 5132, pp. 21-32, 35-42, 50-53, 56-81). Moreover, the procedural points being jurisdictional, they could be raised even on review. Respondent properly makes no special point of the matter. The court below did not mention it. We make this statement to rest any possible question.

were set forth. Every pertinent statement of the showings rested on a "belief". (R. 5131, p. 2; R. 5132, p. 2).

We do not deny that when the elements of a showing are before the court there is judicial discretion as to whether they constitute a "proper showing". We do assert, however, there is no discretion to abandon a provision of the Act by accepting something which is no showing at all. We assert that statements of unsupported "beliefs", whether or not verified, are not showings and hence could not be "proper" showings. We pointed out in our main brief that a proper showing, in contemplation of law, is proof of facts (our main brief, p. 42), which excludes proof of unsupported "beliefs". Determining and weighing "beliefs" were the function of the Inquisitor (*Lea: History of the Inquisition of the Middle Ages,* Vol. I, pp. 400, 433). Unsupported "beliefs" have never invoked judicial action. Even the beliefs of experts must be premised on facts in the case.

The Act provides a revolutionary, unprecedented extension of the reach of process. Citizens may be commanded to return from the remotest corners of the earth, wherever subpoenas may reach them. Prior to the Act, largely due to consideration for the convenience of witnesses, witness-subpoenas were confined to closely circumscribed orbits. When served outside of those orbits they were invalid. *Robertson* v. *Railroad Labor Board,* 268 U. S. 619, *supra.*

If restrictions were not thrown about subpoenas to be served "beyond the jurisdiction of the United States", there would be unwarranted requisitions for them with resulting interference in the liberties of absent citizens, wasteful expenditures of public funds, and abuse of judicial process. *Section 2* of the Act must have contemplated those dangers and must have intended to protect against them, for, otherwise, the Act would have provided that subpoenas should issue automatically as a part of administrative routine.

The provision being for the protection of the citizen, and therefore mandatory, (*French* v. *Edwards*, 13 Wall. 506, 511), the intent of the Act, and the language being clear, the contempt proceedings being special proceedings in derogation of the common law, the burden is on the Government of proving strict compliance. *Galpin* v. *Page*, 18 Walk 350, *supra*. The government met the burden of proving a "proper showing" by proving a record of "beliefs" which is exactly what a "proper showing" is intended to exclude.

Reply H-b—Subpoenas Did Not Carry Notice of the Act.

Respondent admits the subpoenas did not carry notice of the Act. (R. B. 40). It argues that such notice was not necessary because petitioner constructively and actually knew about the Act, and that under the common law a subpoena served extraterritorially *is valid.* (R. B. 40-41).

Let it be assumed, for present purposes, that petitioner was constructively charged with knowledge of the special Act (there could be considerable argument about that). Let it be assumed that petitioner discussed with his counsel the subpoenas and the special Act. *Unlimited discussion of the special Act could not identify a subpoena as a special Act subpoena if it did not carry notice of the fact. Unlimited discussion of a general law subpoena could not change such subpoena into a special subpoena under the special Act.* Petitioner and his counsel were also presumptively charged with knowledge that extraterritorially served general law subpoenas are invalid. Confronted with general law subpoenas (R. 5131, pp. 7, 9; R. 5132, p. 4), petitioner and his counsel were entitled to consider them invalid. Nothing done or said by the Consuls in making the services and tenders gave notice of the Act (R. 5131, pp. 8, 9-10; R. 5132, p. 5).

For the purpose of the present point, it might be conceded that extraterritorially served common law sub-

poenas are valid (of course, if that were true, there would be no point to the special Act), but nothing can be made of that, for respondent elected to proceed, and did proceed under the special Act in question. (See Records). Respondent must, therefore, prove that it complied with the special Act. This cannot be proved without proving that petitioner received subpoenas under the special Act. Respondent admits that petitioner received subpoenas which did not carry notice of the special Act (R. B. 40). The record shows and the court below stated, that petitioner received ordinary subpoenas (R. 5131, pp. 7, 9, 92, 102; R. 5132, pp. 4, 88, 98).

If extraterritorially served subpoenas were valid under the common law, disobedience of them would invoke normal contempt punishment. The punishment procedure invoked by respondent is *quasi in rem* or *rem* punishment which is in derogation of the common law. It is, therefore, unnecessary to reconsider *Bartue and Duchess of Suffolk, Knowles* v. *Luce,* and *Robertson* v. *Railroad Labor Board, supra.* Those cases have already received our attention (our main brief, pp. 28-29; this brief, pp. 15-18, 21-22).

Reply H-c—Lack of Notice to Petitioner in the Cases at Bar of Facts Constituting Offense and the Claim Against His Property.

Respondent says (R. B. 42) that the subpoenas received by petitioner advised him: (1) in what case to appear; (2) that it was by order of the President of the United States; (3) when and where to attend court; (4) to testify on behalf of the United States and not to depart without leave.

The subpoenas did not carry notice that they issued by order of the President (R. 5131, pp. 7, 9; R. 5132, p. 4). The subpoenas carried the usual presidential salutation (not required by the Act). If they had carried notice that they had issued by order of the President, the punitive procedure on that ground alone would have been in-

valid. The contempt under the Act is contempt of court, not of the President. Otherwise, respondent is correct as to the advice received by petitioner from the subpoenas.

The advice did not afford petitioner notice that he was subpoenaed under the special Act in question. A subpoena containing the advices above enumerated is a general law subpoena and is invalid when served extra-territorially (our main brief, pp. 24-30; this brief, pp. 8-25). An invalid subpoena cannot furnish the basis of punitive proceedings. *Ex parte Fiske*, 113 U. S. 713, 718. See also *United States* v. *Shipp*, 203 U. S. 563, 573; *Ex parte Rowland*, 104 U. S. 604; *In re Sawyer*, 124 U. S. 200.

The statement that petitioner was advised of the "object" of the hearing and seizure, is hardly illuminating. In 5131, petitioner was advised that there was to be a hearing on the general subject of "contempt". There was no notice that the hearing would have anything to do with a subpoena. (R. 5131, pp. 11-12). In 5132, petitioner was advised that there was to be a hearing on his alleged failure to obey an unidentified subpoena "heretofore issued" in the *Sinclair-Fall case*. (R. 5132, pp. 11-12). But petitioner had already received three subpoenas out of two trials of that case. (R. 5131, pp. 7, 9; R. 5132, p. 4). In 5131 and 5132, petitioner was advised that the Marshal had been ordered to seize undescribed property of petitioner to satisfy possible resulting judgments. (R. 5131, pp. 11-12; R. 5132, pp. 11-12).

Of course, to that extent, petitioner was advised of the "object" of the proceedings and of the seizures, but he was not advised of the *specific* "object" of the hearing, the *specific offenses* or the *specific claims* against the property to be adjudicated.

To illustrate: he was not advised (1) that the offenses or the claims against the property involved failures to obey definitely described subpoenas; (2) that such definitely described subpoenas were issued under the Act; (3) that they carried notice that they issued under the Act; (4) that the punitive procedures, the citations

and the notices were under the Act; (5) that the described property was levied upon and seized and held to satisfy possible judgments pursuant to authority of the Act.

We have seen that a general citation is not notice of an offense. *In re Rosser,* 101 Fed. 562 (C. C. of A. 8th Circ. Op. by Judge Sanborn).

We have seen that due process requires notice of the offense and specific, determinate and clear claims against the property. (Our main brief, p. 44; this brief, p. 33, *supra*).

Reply H-d—Abandonment of Levy and Seizure.

Respondent (R. B. 43) repeats the criticism of the court below to the effect that our cases on abandonment are not applicable here because there were two different seizures in two different actions.

It is true the principle was drawn from decisions which involved two seizures of the same property by the same party in the same action. But what is the distinction? The principle is based upon the presumption that the second seizure would not have been made if it had been intended to proceed on the first; hence, the second seizure is incompatible with the maintenance of the first and imputes its abandonment. What harmonizing element serving to stay the operation of the principle is introduced by a second cause of action, assuming, of course, that the two seizures are on *all* of the same property and are made by the same party? The principle is not an artificial thing bounded by the facts of four or five cases. It is just common sense—an adoption by the law of the every-day aphorism—"You can't eat your cake and have it too".

Entirely aside from the presumption of law, the physical facts shown by the record show abandonment in fact. There were no open equities in 5131 inviting the seizure made in 5132. *All* of the bonds were seized, taken in to the Marshal's custody, appraised, and dedicated for the jurisdiction and to secure a possible judgment in

5131. (R. 5131, p. 11). The action 5131 had not proceeded to judgment when the second seizure of the same property was made for the jurisdiction and to secure a possible judgment in 5132. (R. 5132, pp. 11-12, 56).

The seizure in 5132 did not pretend to be a seizure of outstanding or contingent equities. *All* of the same bonds previously, entirely and then dedicated to 5131, were dedicated to 5132; they were again seized and actually taken into the Marshal's custody and again were independently valued by a new group of appraisers (R. 5132, pp. 11-14). That is why we say the physical facts shown by the record show abandonment in fact of the first seizure and hence of jurisdiction in 5131. This cannot be refuted except by demonstration that two different things can occupy the same space at the same time.

The seizure in 5132 was invalid because it was not authorized by the Act which expressly provides that property seized shall be "held to satisfy any judgment that may be rendered against such witness in the proceeding *so instituted,*" (Act, Sec. 5)—not to satisfy the judgments of as many successive proceedings as shall suit the convenience or the policy of the prosecution or of the Marshal. The Act, in derogation of the common law, must be strictly construed according to its terms. The burden of showing jurisdiction is on respondent. *Galpin* v. *Page,* 18 Wall. 350, 371, 372.

Reply H-e—Petitioner not Subpoenaed to Attend a Trial on April 9, 1928 (5132).

Petitioner was adjudged guilty of contempt for not attending a trial on April 9, 1928. Petitioner was not subpoenaed to attend a trial on April 9, 1928; he was subpoenaed to attend a trial on April 2, 1928. Respondent contends that the "not depart" clause of the subpoena had the effect of requiring petitioner to attend on April 9, 1928. The "not depart" clause was not authorized by the Act. The Act provides that the subpoena shall command "the witness to appear before the court at a time

and place therein designated" (Act, Sec. 2). The purpose is to attend "the trial of a criminal action" (Act, Sec. 2). It follows, that under the Act, to be strictly construed, "general attendance", or "term", or "not depart" subpoenas, are not authorized. And, rightly so, for assuming the slightest attention to the convenience and liberties of the witness, Congress could hardly have intended that one summoned from any part of the earth "beyond the jurisdiction of the United States" to attend a trial on a date certain, should be required in addition to await indefinite further postponements not mentioned in the subpoena, and not before the court when the subpoena issued. If such had been the intention the Act would have said so.

Respondent states that had petitioner attended on April 2, 1928, he would have been advised of the continuances of the case. Respondent is wrong. *There were no proceedings of any kind on April 2, 1928.* On March 22, 1928, the case was set for April 4, 1928. On April 3, 1928, the case was set for April 9, 1928. (T. R. 5132, pp. 62-65).

CONCLUSION.

It is therefore respectfully submitted that these cases call for the exercise by this Court of its supervisory powers, and that writs of certiorari should be granted and this Court should review and reverse the decisions in these cases in the Court of Appeals of the District of Columbia.

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FILE COPY

JAN

Supreme Court of the United States

OCTOBER TERM—1931.

No. 200—No. 201

HARRY M. BLACKMER,
Appellant,

v.

UNITED STATES,
Appellee.

APPELLANT'S SUPPLEMENTAL REPLY BRIEF.

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FOREWORD

The fundamental positions of Appellant were set forth in the brief filed with his petition for writs of certiorari, herein referred to as "our first brief" and in his brief, herein referred to as "our first reply brief", in reply to that filed by Appellee in opposition to the granting of the writs. After this Court granted the writs, Appellee filed an additional brief, herein referred to by the initials A. B., and Appellant submits this supplemental reply brief in answer thereto.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM—1931.

No. 200. No. 201.

HARRY M. BLACKMER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee.*

APPELLANT'S SUPPLEMENTAL REPLY BRIEF.

REPLY A

The Invalid Subpoena and Consular Function

Preliminary

In our reply to that part of appellee's first brief (in opposition to the petition for writs of *certiorari*) which advanced arguments of expediency to support the constitutionality of the Act, we said:

> (Our first reply brief, p. 6) "It may be conceded that the Act in question is unconstitutional without it following that a valid law could not be enacted which would serve the same purpose even more efficiently. If the authors of the Act had not sought their precedents in outlawry (seizure of property to coerce appearance), the Inquisition

(subpoenas on "belief" and trials in *absentia*), and the religious quarrels of the reign of Queen Elizabeth (for the name of the crime—"recusancy"),—had instead paid more attention to the decisions of this court, a way would have opened."

We were hinting the presumption of argument that if the Walsh Act should be declared unconstitutional the Government would stand powerless with respect to the testimony of absent citizens. We did not elaborate our theory because it is not our burden to point the way to a valid act, because we wanted to avoid irrelevant by-paths, and because in our opinion if a constitutional act were passed it would nevertheless represent unsound policy having in mind the proper liberties and convenience of the citizen.

To relieve appellee's curiosity and to end its fantastic conjecturings, we will say that we were thinking of methods referred to in the cases cited by it, to wit, *Hess* v. *Pawloski*, 274 U. S. 352; *Wuchter* v. *Pizzutti*, 276 U. S. 13 (A. B., pp. 17-18).

The Massachusetts law declared valid in the *Hess* case and the New Jersey law declared invalid in the *Wuchter* case, provide for the appointment of a state official as agent for the absent party to receive service of process. The initial jurisdiction *in personam* obtained by service of process upon the defendant's agent within the state is completed (when such legislation is valid) by compulsory informatory notice to the absent defendant at the place of his residence. It is our contention that even under such an Act the notice, in the absence of appropriate treaty provisions, would have to be served by someone other than a consul.

In view of the foregoing we do not regard it as necessary to take up in detail appellee's feverish astronomy to find an admission which does not exist (A. B., pp. 15-19).

The issue as to the subpoena.
The subpoena is not a notice.

Aside from the consular point, the subpoena issue as now developed seems to turn in the main part on whether the service of the subpoena "beyond the jurisdiction of the United States" represents an exercise of power to initiate jurisdiction *in personam*, or is the delivery of a notice of a pre-existing jurisdiction *in personam*.

In this connection we suggest it should be kept in mind that the request for the witness-subpoena under the Act, its issuance and service have no relation to jurisdiction through attachment of property (Act, sec. 2). Jurisdiction through attachment of property is not involved until after the subpoena has been issued, served and disobeyed, and it has been determined to exercise the option to punish (Act, secs. 4, 5, 6).

Appellee's admissions narrowing the issue.

It is helpful to note that appellee admits that without the aid of treaties this nation may not exercise extra-territorial judicial jurisdiction; that if the court does not have preliminary territorial jurisdiction of a *res*, status or personal relationship, the extra-territorial service of process is a jurisdictional act.

So that this may be clearly before the Court, we excerpt the following from appellee's brief:

> (A. B., p. 18) "When it is said that the court 'acquires' jurisdiction by its process, subpoena or summons, the expression relates to the necessity of notice to comply with 'due process', *unless there was no jurisdiction of a personal relation, inherently or by consent, or of a res in custodia legis, in which case it may be said that jurisdiction is 'acquired' by the service of the process.*" (Our italics.)
>
> (A. B., p. 71) "Of course there may be other kinds of process than subpoenas and summons

which are in their execution, an exercise of jurisdiction, such as writs of attachment. *Also, if the court has not taken jurisdiction of the subject matter, such as property, or a status, such as citizenship, which is within its jurisdiction, the process may more properly be termed a jurisdictional act, and command rather than a mere notice.*" (Our italics.)

(A. B., p. 38) "We do not claim the United States has the right to invade by force the territory of another sovereign against its will and to take a citizen into custody and forcibly return him to this country, but we claim the United States has the right to create an obligation of citizens abroad to return, *to enforce the obligation by an exercise of power within the territorial domain of the United States, provided the citizen has had the notice essential to due process.*" (Our italics.)

(A. B., p. 69) "Of course, where the jurisdiction needed is such as will bring the person to the bar of the court to confront witnesses against him and to receive the sentence of the court, actual physical power over the accused may be necessary."

(A. B., p. 76) "In *Dainese* v. *Hale*, 91 U. S. 13 (1875), cited by the appellant (B., 29) the consul undertook to seize property as upon attachment. Can appellant compare such plainly judicial conduct with carrying and delivering a command or notice?"

(A. B., p. 76) "In *Re Ross, Petitioner*, 140 U. S. 453 (1891), cited by appellant (B., 29) the court was considering the effect of constitutional limitations upon the procedure in a consular court. *In holding court a consul exercises a sovereign judicial power which, of course, calls for consent of the sovereign where the court is held.*" (Our italics.)

Appellee's Notice Theory.

These admissions necessarily drive appellee to the position that the subpoena under the Act is a mere notice, the service of which does not involve the extra-territorial

exercise of power. The theory on which it is sought to transform the subpoena into a notice is stated by appellee as follows:

> (A. B., pp. 69-71) "The obvious theory of the Walsh Act is that if the Court grants a petition for the recall and appearance of a citizen desired as a witness that the court thereby takes cognizance of and jurisdiction over the witness' status as a citizen and his relation to the United States and creates an obligation and duty of the citizen to return. But so far it is not such an obligation and duty as would authorize enforcement of a penalty for non-compliance. This is solely because due process and natural justice call for notice to the citizen of the creation of his obligation and duty. It was a potential obligation, inherent in his citizenship, but he must have notice that it has been changed to an actual obligation.
>
> * * * * * * *
>
> "So the Walsh Act requires as the second step that which is necessary to due process—notice—and exercises an option as to the form of notice by specifying that it shall be in the form of a subpoena. That a subpoena is specified does not change the nature or function of what is required or what is given. Form yields to substance. * * * The subpoena would have to be followed with a writ of bodily attachment before it would be anything more than a notice * * *.
>
> "But when the court has taken cognizance of and jurisdiction of a subject matter within its territorial jurisdiction its initial process in essential nature is a mere notice to come in and testify or defend or the consequences may be a default judgment or penalty provided by statute as in the Walsh Act."

Statutory agent cases are not analogous.

In its latest brief appellee has embellished its doctrine that the subpoena under the Act is a mere notice by the addition of statutory agent cases.

An analogy is argued from *Wuchter* v. *Pizzutti, supra,* 276 U. S. 13 (A. B., p. 18). The notice there considered (declared invalid because not required by statute) was an informatory notice advising the absent party that jurisdiction in personam had already been taken by service of summoning process upon his statutory agent within the territorial limits of New Jersey where the action was commenced. The case is quickly distinguished by observing that there is no provision in the Walsh Act for the appointment of a resident statutory agent or for territorial service of any kind.

In Rem Cases are not analogous.

To its point that the subpoena is a mere notice appellee discusses pure *in rem* authorities such as *Perez* v. *Fernandez,* 220 U. S. 224, and *Luria* v. *U. S.,* 231 U. S. 9 (A. B., pp. 44, 47).

These authorities are valueless for the reason that in every *in rem* action there is a territorial status or *res* initially seized for jurisdiction, subjected to litigation, to the court's judgment and to the satisfaction thereof, whereas the most exuberant imagination cannot invent a seized litigated status or *res* out of the issuance and service of the witness-subpoena under the Act.

Luria v. *United States,* 231 U. S. 9 (A. B. p. 47), involved an action under *Section 15 of the Act of June 29, 1906* (34 Stat. 596, 601, c. 3592) to set aside and cancel, as fraudulently and illegally obtained, a certificate of citizenship theretofore issued to Luria. The action was likened by this court to a suit to cancel a patent for public land or letters patent for an invention (Case, p. 28).

Luria's status as a citizen and his certificate of citizenship were within the court's territorial jurisdiction and were directly before the court for litigation. The court, having jurisdiction over the litigated status and of the *res*—the certificate of citizenship,—it was not necessary to acquire personal jurisdiction of Luria by summoning

process; an informatory notice completed the court's jurisdiction to litigate and to pass judgment on that which was before it and which was the proper subject of the suit. It may be added that the validity of the notice was not before this court.

Perez v. *Fernandez*, 220 U. S. 224, cited by appellee (A. B. 44) was also an *in rem* action under *Sec. 57 of the Judicial Code*, and concerned title to property in Porto Rico. The court had initial territorial jurisdiction over the subject matter of the suit—the lands, and an informatory notice, served anywhere to the interested party, was sufficient.

As to *quasi in rem* cases. It was said in *Cooper* v. *Reynolds*, 10 Wall. 308:

> (318) " * * * first, the judgment of the court, though in form a personal judgment against defendant, has no effect beyond the property attached in that suit. * * * Second, the court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return, that none can be found, is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court. Now, in this class of cases, on what does the jurisdiction of the court depend? *It seems to us that the seizure of the property or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely in rem.*" (Our italics)

In treating the same subject *Cooley* draws the distinction between notice and process:

> *(Cooley's Constitutional Limitations*, 8th. ed., vol. 2, pp. 852-856) "But such notice (in *quasi in rem* cases) is restricted in its legal effect, and cannot be made available for all purposes. It will enable the court to give effect to the proceeding so far as it is one *in rem*, but when the *res* is disposed of, the authority of the court ceases. The statute may

give it effect *so far as the subject matter of the proceeding is within the limits, and therefore under the control, of the State; but the notice cannot be made to stand in the place of process; so as to subject the defendant to a valid judgment against him personally.*" (Our italics and parenthesis)

In the case of a witness-subpoena under the Act there is no property or litigated status or *res* upon which jurisdiction to command the testimony of the witness can possibly initiate. There is no territorial levy of a writ of attachment. The petition for the subpoena is required to contain a "proper showing" of need of the absent person's testimony (Act, sec. 2). It has nothing to do with the seizure of property; it does not request a judgment as to a *res* or status or as to anything affecting the witness; it is entirely *ex parte* and cannot be contested. The subpoena when issued commands the absent person's testimony (Act, sec. 2). There is no provision for notice to the witness that the court has seized his property or intends to litigate a *res* or status in which he is interested. The petitions for subpoenas and the resulting subpoenas in the cases at bar fully sustain this interpretation of the Act (R., 200, 1-3, 7, 9; R., 201, 1-4). If the absent person responds to the command of the subpoena he gives testimony at a criminal trial in which he is not a party. The judgment at the criminal trial does not affect him. If the witness does not respond to the command of the subpoena, all that remains is the option to subject him to the separate and later punitive procedure.

Of course, if the subpoena is invalid the punitive procedure is invalid. *Ex parte Fiske*, 113 U. S. 713; see also *U. S.* v. *Shipp*, 203 U. S. 563; *Ex parte Rowland*, 104 U. S. 604; *In re Sawyer*, 124 U. S. 200. And if the punitive procedure were valid it could not reach back to validate the invalid subpoena procedure.

Domicile cases are not analogous.

In developing its argument that the subpoena is a mere notice, appellee cites the following Massachusetts cases:—*Langdon* v. *Doud*, 88 Mass. 423, 435; *Henderson* v. *Staniford*, 105 Mass. 504, 505; *Nichols* v. *Vaughan*, 217 Mass. 548 (A. B., p. 54).

Appellee's excerpt from *Langdon* v. *Doud, supra*, shows its lack of merit as a precedent in the cases at bar (A. B., p. 54):

> (88 Mass. 425) "*So long as a debtor has a last and usual place of abode in the Commonwealth, that is while he retains his domicile or residence here*, the courts of the state have jurisdiction over him and due service of legal process can be made upon him * * * a writ can be served by leaving a summons at his last and usual place of abode, and in case of his absence from the state actual notice * * * can be given to him so that a valid and binding judgment can be obtained" (our italics).

The element of domicile is also emphasized in the following from *Nichols* v. *Vaughan, supra*, 217 Mass. 548 (1914), 105 N. E. 376:

> (105 N. E. 377, 378) "The defendant contends that these decisions are no longer law because of Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565, wherein it was held that there could be no personal judgment against a non-resident defendant over whom jurisdiction was obtained solely by attachment of property. *That case does not go to the extent of holding that the courts of the state in which one is domiciled* and to which he owes allegiance cannot acquire jurisdiction over him so as to be able to render a judgment in personam except after personal service of process upon him within the state. There are, however, expressions in several decisions of that court which lend support to that view. *Freeman v. Alderson*, 119 U. S. 185, 188, 7 Sup. Ct. 165, 30 L. Ed. 372;

Clark v. *Wells,* 203 U. S. 164, 170, 27 Sup. Ct. 43, 51 L. Ed. 138; *Caledonian Coal Co.* v. *Baker,* 196 U. S. 432, 444, 25 Sup. Ct. 375, 49 L. Ed. 540; *Goldey* v. *Morning News Co.,* 156 U. S. 518, 521, 15 Sup. Ct. 559, 39 L. Ed. 517; *Mexican Central R. R.* v. *Pinkney,* 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699; *Noble* v. *Union Ring Logging Co.,* 147 U. S. 165, 173, 13 Sup. Ct. 271, 37 L. Ed. 123; *Harkness* v. *Hyde,* 98 U. S. 478, 25 L. Ed. 237. *Cooper* v. *Reynolds,* 10 Wall. 308, 19 L. Ed. 931, goes very far towards sustaining that contention. It is supported by *Raher* v. *Raher,* 150 Iowa, 511, 129 N. W. 494, 35 L. R. A. (N. S.) 292, Ann. Cas. 1912D, 680, *De la Montanya* v. *De la Montanya,* 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165, *Smith* v. *Grady,* 68 Wisc. 215, 31 N. W. 477, and *Moss* v. *Fitch,* 212 Mo. 484, 111 S. W. 475, 126 Am. St. Rep. 568. See Ann. Cas. 1912 D 680. Of course if that is the law under the fourteenth amendment of the federal Constitution as established by the Supreme Court of the United States, it is authoritative and binding upon all state courts. *Eliot* v. *McCormick,* 144 Mass. 10, 10 N. E. 705. See also *Porter* v. *Prince,* 188 *Mass.* 80, 74 N. E. 256. *But however that may be, the point here presented is one of interpretation of our statute of limitations and not one of sufficiency of service of process''* (our italics).

The distinction arises from the fact that the Walsh Act makes nothing of the residence or domicile of absent citizens. This is conceded in appellee's brief:

(A. B., p. 15) "In the applications for the issuance of subpoenas and in the petitions for the orders to show cause the government alleged that the appellant is a citizen of the United States and he admits his citizenship. Although the Walsh Act authorizes the subpoenaing of aliens domiciled in the United States temporarily abroad the validity of such provision need not be considered in this case. *The government alleged that the appellant was domiciled in the United States but made no effort to prove the fact and the allegation may be regarded as surplusage.''*

Robertson v. Railroad Labor Board is not authority for extra-territorial service of process.

To a proposition which, if supported, would sustain the subpoena's validity without going further—"A court's jurisdiction to subpoena witnesses is not limited to its territorial jurisdiction or its physical power over the person of the witness" (A. B., p. 64)—appellee discusses *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, and says:

> (A. B., pp. 65, 66) "In this case the court was dealing with a purely *in personam* as distinguished from a *quasi in rem* method of enforcing the attendance of the witness and not with the scope of the power to subpoena. The court was not dealing with the power to authorize an officer to serve papers outside the territorial limits of his sovereign. The court was dealing with the rule established by the judiciary act and that existed at common law and was not considering the power to change the common law or the rule established by the judiciary act so as to permit jurisdiction *in personam* upon service without the territorial jurisdiction of the court. The language used on page 626 of the opinion shows plainly the view of this court that if the statute had so provided the federal court for Illinois could have adjudicated the contempt charge *even though the witness was beyond its territorial jurisdiction. The judgment of the Federal Court in Illinois might have been unenforcible by such court without affecting the validity of its judgment.*" (Our italics.)

The significance of the case escapes appellee. It contains the clearest expressions that Congress has power to extend the reach of process throughout the United States (Case, p. 622). We do not challenge this. But there is not a word in the case to support the reach of process beyond the territorial limits of the United States or beyond a judicial district within the United States as it might be enlarged by Act of Congress.

If the witness is found within the court's territorial jurisdiction whatever its area within the United States, the judgment is enforcible. The power to seize takes care of that. If the witness is beyond the court's territorial jurisdiction whatever its area within the United States, the judgment is unenforcible, is void. Due process takes care of that.

The citation of *Toland* v. *Sprague*, 12 Peters 300 (Case, p. 622) indicates that this court was not unaware of its earlier declaration that the extra-territorial service of process could not have been in the contemplation of Congress.

The important bearing of the *Robertson* case on the validity of the subpoena under the Walsh Act is in its declarations that:

(a) The summoning process of a Federal court commanding personal appearance and personal testimony of a citizen of the United States must be served within the court's territorial jurisdiction (Case, p. 622). Obviously, it follows that when we know the territorial limits of the nation, we know the ultimate reach of personal summoning process.

(b) The territorial principle was a part of our common law existing at the beginning of the nation (Case, p. 622). This destroys the relevancy of contrary English common law doctrines.

(c) Although the case involved the Government of the United States as the moving party and a citizen of the United States as defendant, the doctrine of allegiance received no consideration in this court's construction of the statutes involved to determine the valid reach of summoning process.

(d) Although Congress made it the duty of prospective witnesses to testify before the Railroad Labor Board, and to respond to the summons of Federal courts acting to enforce the right of the Board to secure testimony,

just as it attempted to make it the duty to testify under the Walsh Act,—it was neither argued nor held that such duty or the status of citizenship gave the court an initial *quasi in rem* jurisdiction over the desired witness with the effect of converting the court's summons into a notice which might be served anywhere.

Perhaps this court had in mind the statement in *Blair* v. *United States,* 250 U. S. 273, excerpted by appellee (A. B. 33):

> (p. 281) "The giving of testimony and the attendance upon court or grand jury in order to testify, are public duties which every person *within the jurisdiction* is bound to perform *upon being properly summoned.*" (Our italics.)

(e) The declaration that the territorial limitation on the reach of process applies to the United States as well as to private citizens (Case, p. 623) excludes allegiance as a factor in the problem before us, for surely, the duty of allegiance binds the citizen at Cleveland, Ohio, as well as at Paris, France.

To the same proposition, that is, that a court's jurisdiction to subpoena witnesses is not limited to its territorial jurisdiction or its physical power over the person of the witness, appellee cites *Michigan Trust Co.* v. *Ferry,* 228 U. S. 346 (A. B. p. 66).

In that case it was held that:

> (p. 353) "Ordinarily jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign's pleasure. But when that power exists and is asserted by service at the beginning of a cause, or if the party submits to the jurisdiction in whatever form may be required, we dispense with the necessity of maintaining the physical power and attribute the same force to the judgment or decree whether the party remain within the jurisdiction or not. This is one of the decencies of civilization that no one would dispute.

> It applies to Article IV, Sec. 1, of the Constitution, so that if a judicial proceeding is begun with jurisdiction over the person of the party concerned it is within the power of a State to bind him by every subsequent order in the cause. *Nations* v. *Johnson,* 24 How. 195, 203, 204. This is true not only of ordinary actions but of proceedings like the present. It is within the power of a State to make the whole administration of the estate a single proceeding, to provide that one who has undertaken it within the jurisdiction shall be subject to the order of the court in the matter until the administration is closed by distribution, and, on the same principle, that he shall be required to account for and distribute all that he receives, by the order of the Probate Court."

Appellee excerpts the first sentence of that part of the opinion above quoted (A. B., p. 66), omits the remainder which sets out the controlling jurisdictional theory of the case and argues that by the use of the word "ordinarily" this court reserved unnamed exceptions to the rule (A. B., p. 67).

By attention, however, to the entire context in which the word appears, it is clear beyond the slightest doubt that the exception contemplated by the use of the word "Ordinarily" is that:

> (p. 353) "*When that power exists* (the power to seize the person) *and is asserted by service at the beginning of a cause, or if the party submits to the jurisdiction in whatever form may be required,* we dispense with the necessity of maintaining the physical power and attribute the same force to the judgment or decree whether the party remain within the jurisdiction or not. This is one of the decencies of civilization that no one would dispute." (Our parenthesis and italics.)

With the complete principle before us it is apparent that the publication in Michigan and the service on Ferry and his guardians in Utah were construed as notices of

a pre-existing jurisdiction *in personam* which attached to Ferry, when he was in Michigan and qualified himself as executor in the Michigan Probate Court.

Suffice it to say, the Walsh Act does not contemplate service of the subpoena or any other process prior to the citizen's departure from the country; does not provide for the citizen's submission to the jurisdiction of any Federal court prior to his departure and prior to the service of the subpoena (See Act).

The power of recall is not judicial—If it can be delegated to the Judiciary, its exercise must accord with Judicial due process.

With appellee's major divertissements out of the way, we shall give attention to that which we think is most relied upon, to wit, that which is argued from the power of recall and from the doctrine of jurisdiction *in personam* by virtue of sovereign control.

As to the power of recall:—Let it be assumed that the power exists and in some constitutional way may be transferred from the Legislature where it reposes (*Meyers, Administratrix* v. *United States,* 272 U. S. 52, 235) to the judiciary. The assumption implies that the power changes its nature from a legislative to a judicial power. For, otherwise, that which is attempted is a clear violation of the separated powers of our Government under the Constitution. *Federal Radio* [redacted] v. *Gen. Elec. Co.,* 281 U. S. 464; *Muskrat* v. *United States,* 219 U. S. 346. Once the power becomes judicial its exercise, of course, must accord with judicial due process. Judicial due process requires that to obtain jurisdiction *in personam* there must be territorial service of process or voluntary appearance (Our main brief, pp. 25-26; Our first reply brief, p. 18).

We think this meets everything arguable from the power of recall, but perhaps it will not be amiss to give some attention to its nature and as to whether it could possibly function under the Act.

A legislative recall is a political recall. We have seen that the power was exercised in England to coerce the return to that country of absent citizens who were suspected of engaging in conspiracies against the sovereign, and for religious reasons. *Bartue and Duchess of Suffolk*, 2 Dyer's Rep. 176-b, 73 Eng. Rep. Full Reprint, 388; *Knowles* v. *Luce*, Moore 109, 72 Eng. Rep. Full Reprint 473 (A. B. 43-44).

In this country the only exercise of a comparable power by the National Government which we have been able to find has been in connection with calls for the return of absent citizens for military service. It is interesting to note that on such occasions this nation enters into treaties with its allies providing for reciprocal assistance with respect to absent nationals. See, for example, "Convention Providing for Reciprocal Military Service", of 1918, between the United States and France, and similar conventions of the same type and period with Great Britain and Italy. *Malloy's Treaties*, V. III, pp. 2592, 2650, 2708. This court, in *Crapo* v. *Kelly*, 83 U. S. 610, declared that even in the emergency of war the nation's right to reclaim the military service of citizens can be exercised only within its own territory.

The Federal judiciary has never employed its process for the recall of citizens for religious or political reasons or to bring back absent citizens for military service. These functions are so self-evidently non-judicial that argument which implies their presence in the Act also implies the Act's unconstitutionality.

But the Act makes it clear that Congress legislated with respect to judicial process. The petition for a subpoena must make "proper showing" for the need of the desired testimony at a judicial hearing—the trial of a criminal case (Act, sec. 2). The court's decision as to whether it will authorize the issuance of a subpoena is necessarily judicial and is limited to the consideration of that which appears in the petition. The term "sub-

poena'' connotates judicial process. The subpoena, when it issues, is a judicial command to the absent person to appear in a court at a judicial trial and give his testimony (Act, sec. 2). The punishment procedure is judicial, is to punish the failure of the witness to appear and testify at a judicial proceeding as commanded in the subpoena (Act, sec. 7).

In a word, the procedure under the Act, from the beginning to the end, concerns itself exclusively with judicial procedure, which excludes any notion that it has anything to do with the enforcement of a legislative power of recall.

Furthermore, the reports and debates preceding the enactment of the Act deal with the desirability of such legislation for the purpose of securing desired testimony in civil and criminal cases. There is nothing in the history preceding the enactment of the Act to show that the purpose was to delegate to the Federal judiciary the exercise of the legislative power of recall. See Report of the Chairman of the House Committee on the Judiciary (Rep. No. 1313; 69th Cong. 1st Sess.).

English extra-territorial exercise of the power of recall. The Bartue and Knowles cases.

The cases of *Bartue and Duchess of Suffolk,* (1559) 2 Dyer's Reports, 176-b, 73 Eng. Rep. (Full Reprint), 388, and *Knowles* v. *Luce,* (1579) Moore 109, 72 Eng. Reprint (Full Reprint) 473, declared the ancient prerogative of the English sovereign recognized by English common law and statutes of Parliament, to recall absent English citizens. *Knowles* v. *Luce, supra,* (72 Eng. Rep., Full Reprint 473, 474).

The exercise of this power by a personal sovereign was not judicial. The contempt was contempt of the Queen. The purpose of the recall was political and religious. In those days the Exchequer Courts declaring the contempts were in the nature of personal agents of

the Sovereign, primarily interested in the management and collection of the royal revenue. *Cooley's Blackstone* Book 3, Chap. 4, p. 44.

Whatever may have been or may now be the common law of England on the reach of personal process in connection with the political power of recall or judicial proceedings, it cannot have the slightest relevancy here, for, as we have seen, the common law of this country from the beginning required territorial service of process or voluntary appearance for judicial jurisdiction *in personam. Robertson* v. *Railroad Labor Board,* 268 U. S. 619.

It may be added that although the English sovereign and Parliament were supposed to conform to the Law of the Land, yet, if they failed to do so, there was no relief for the citizenry of those days except by resort to arms or to the block.

Coke says:

> (*Coke's Fourth Institutes,* 4th part, p. 36) "Of the power and jurisdiction of the parliament, for making laws in proceeding by bill, it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds."

Blackstone says:

> (*Blackstone: Commentaries*—Cooley, 1884—vol. I, p. 91) "But if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it; and the examples usually alleged in support of this sense of the rule do none of them prove, that where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature which would be subversive of all government * * *. But if we could conceive it possible for the Parliament to enact that he should

try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature * * *".

There is no question that Blackstone's statement is the law of England at the present time. *Mott's Due Process of Law*, p. 56. In the colonies the doctrine that whatever Parliament declares is the law of the land continued to be the center of attack up to 1776. *Mott's Due Process of Law*, p. 136.

We can derive no valid precedents from jurisdictions where the legislature is omnipotent and its actions are beyond the challenge of judicial due process.

In this country written constitutions were deemed essential to protect the rights and liberties of the people against encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights which were limitations upon all the powers of Government, legislative as well as executive and judicial. *Hurtado* v. *People of California*, 110 U. S. 516, 531, 532. *Charles Warren: Congress, the Constitution and the Supreme Court.* Preface, p. VI: "The authority of the constitutions over governments, and the sovereignty of the people over constitutions, are truths, which are at all times necessary to be kept in mind."—(*James Madison.*)

The irrelevancy of common law Conflicts in relation to appellee's doctrine of jurisdiction in personam by virtue of sovereign control.

Appellee expands its treatment in its earlier brief before this court, of the doctrine of sovereign control with citations of authorities on Conflict of Laws, Private International Law and Removal of Judgments (A. B., pp. 39-41).

Typical of these citations is that of the "Proposed Final Draft No. 1 on the Law of Conflict of Laws", by the American Law Institute.

The following is excerpted (A. B., pp. 39-40; Restatement, p. 114):

> "Section 85. *Individual domiciled within the state.* A state can exercise through its courts jurisdiction over an individual domiciled within the state, although he is not present within the state."
>
> "Section 86. *National of the state.* A state which in the law of nations has standing as a nation can exercise through its courts jurisdiction over its nationals, although they are not present or domiciled within the state."

We pass *Section 85* relating to the exercise of jurisdiction over a "person domiciled within the state" for, as we have seen, neither the Walsh Act nor the Government in the cases at bar takes account of the domicile of the absent citizen (A. B., p. 15).

The first blush relevancy of *Section 86* vanishes when it is remembered that the Conflict of Laws is a part of the common law and disappears when in collision with opposing constitutional principles.

Final Draft No. 1 of the Restatement makes this very clear:

> (p. 21) "Section 5. Legal Nature of Conflict of Laws. *Conflict of laws is a part of the common law, and as such is as binding upon the courts as any other parts of the law of the state.*
>
> "*Comments:* * * * d. *The principles of Conflict of Laws are subject to change only as the principles of other parts of the law are changed, namely, by constitutional* or statutory provisions or treaties or by such gradual changes in legal thought as modify the principles of the common law."

With constitutional principles out of it, there is nothing left to overcome (in a purely domestic case not involving a foreign judgment) the nation's domestic

common law and due process rule that jurisdiction in personam must be acquired by appearance or territorial service of process. *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 622, 623.

The same criticism applies to appellee's other authorities on Conflict of Laws, Private International Law and Removal of Judgments (A. B., p. 41).

Furthermore, *Grubel* v. *Nassauer*, 210 N. Y. 149, and *Smith* v. *Grady*, 68 Wisc. 215, the only American removal of judgment cases cited in the supporting commentaries (to Restatement No. 2) both flatly oppose the Reporter's theory.

This conflict in the subjects of Conflicts and Removal of Judgments is not confined to the *Restatement*. *Freeman on Judgments* (4th ed), recognizes this when he says:

> (par. 570) "In relation to the extraterritorial effect of a judgment procured against a person in *the state of his domicile*, in an action in which he entered no appearance, and in which the process was served constructively, in accordance with the laws of that state, *radical and irreconcilable differences of opinion exist.*" (Our italics.)

Moreover, as has been noted from this excerpt, and as we shall now make additionally clear, the elements of domicile, and mere temporary absence, are essential to the validity of the alleged common law doctrine of Conflicts (aside from constitutional limitations) permitting territorial exercise of jurisdiction over absent citizens by virtue of allegiance.

Black on Judgments (2d. ed) says:

> (par. 227) "Every sovereignty has plenary control over its own subjects, and it may authorize a judgment to be rendered against one of its citizens, upon constructive notice only, and *although he is temporarily absent from its dominions* • • •" (Our italics.)

The editor of *L. R. A.* in his note on *Grubel* v. *Nassauer*, supra, 210 N. Y. 149, 103 N. E. 1113 (Ct. of Appls., 1913), says:

> (L. R. A. N. S. Vol. 52, p. 1914) "As shown in the note to Pinney *v.* Providence Loan & Invest. Co. 50 L. R. A. 577, it is established by the great weight of authority that a court of one state or country will not recognize or enforce a judgment in personam rendered in another against a non-resident upon constructive or substituted service of process without appearance; and, although there was formerly a misapprehension on this point, it is now settled that such a judgment rendered by a state or Federal court is contrary to due process of law, and invalid even in the state where rendered. *These principles would seem to apply to and govern Grubel* v. *Nassauer, unless the bare fact of citizenship in the country where the judgment was rendered may be regarded as a sufficient basis for the recognition extraterritorially of a judgment in personam upon constructive service against one whose domicil and residence were elsewhere.* While there are expressions in some of the cases cited in the note in 50 L. R. A. 585, and also in the note in 35 L. R. A. (N. S.) 225, that might seem to lend color to that view, *it will be observed that the courts were dealing with cases where the defendant was not only a citizen, but a resident of the state or country in which the judgment was rendered, although he may have been temporarily absent therefrom at the time. In such cases, that is, when the judgment defendant is a resident of the state or country in which the judgment is rendered, there is, as shown in the note to Raher* v. *Raher*, 35 L. R. A. (N. S.) 292, *some conflict of authority as to the validity of a judgment in personam upon constructive or substituted service.* Grubel *v.* Nassauer, however, was not such a case, as the judgment defendant, although a citizen of Bavaria, where the judgment was rendered, was a resident of and domiciled in New York." (Our italics.)

We repeat the Walsh Act does not depend upon the domicile of the citizen or his temporary absence. Appellee admits this (A. B., p. 15).

In addition, the common law rule of Conflicts as interpreted by the Reporter in *Section* 86, above excerpted, is limited to states which, in the law of nations, have standing as nations. Where does this leave appellee, which primarily relies on *Mabee* v. *McDonald,* 107 Texas 139, 175, S. W. 676, and *In re Hendrickson* (So. Dak.), 167 N. W. 172, which originated in jurisdictions which do not have international standing as nations?

We regret that the *Harvard Law Review* finds itself in disagreement (A. B., p. 40) with *Grubel* v. *Nassauer, supra,* 210 N. Y. 49, which followed *Pennoyer* v. *Neff,* 95 U. S. 714, 727, in preference to jurisdiction by virtue of sovereign control.

The *Michigan Law Review,* vol. 30, pp. 137-142, (A. B., p. 41) reviews the decision of the court of appeals in the cases at bar and concurs with the opinion of that court. The argument is much the same as that of appellee and we shall not give it separate attention, except to say that the author seems oblivious to the fact that this court has had considerable to say on *the relationship of due process to the root principle* that "no state can exercise direct jurisdiction and authority over persons or property without its territory," and that this principle of due process has been applied to absent citizens of the states and of the United States. More careful analysis of cases like *Toland* v. *Sprague,* 12 Peters, 300; *Picquet* v. *Swan,* 5 Mason 35; *Cooper* v. *Reynolds,* 10 Wall. 308; *Pennoyer* v. *Neff,* 95 U. S. 714 (which at page 762 in referring to *Cooper* v. *Reynolds, supra,* expressly stated that the rule applies whether the absent person is a citizen or a non-resident); *Robertson* v. *Railroad Labor Board,* 268 U. S. 619; *McDonald* v. *Mabee,* 243 U. S. 90,—all dealing with absent citizens might have illuminated the real issues involved. More

attention also to the *due process* rule that jurisdiction in personam *must be acquired* by territorial service of process or voluntary appearance—*Robertson* v. *Railroad Labor Board,* 268 U. S. 619; *Pennoyer* v. *Neff,* 95 U. S. 714; *Boswell's Lessee* v. *Otis,* 9 How. 336; *In re Johnson,* 167 U. S. 120; *McDonald* v. *Mabee,* 243 U. S. 90; *Herndon* v. *Ridgeway,* 17 How. 424; *Michigan Trust Company* v. *Ferry,* 228 U. S. 346; *Baker* v. *Baker,* 242 U. S. 394; *Goldey* v. *Morning News,* 156 U. S. 518; *Insurance Co.* v. *Bangs,* 103 U. S. 435; *Galpin* v. *Page,* 18 Wall. 350; *Wilson* v. *Seligman,* 144 U. S. 41—, might have added something of value to the point now at issue—the validity of a subpoena served extraterritorially without reference to territorial residence or domicile, and designed to command the purely personal testimony of an absent citizen.

The constitutional invalidity of jurisdiction in personam by virtue of sovereign control.

Coming to the constitutional aspects of the doctrine of jurisdiction in personam by virtue of sovereign control. It has been made clear in our earlier briefs before this court that in our opinion the doctrine advanced in *Mabee* v. *McDonald,* 107 Texas 139, 175 S. W. 676, is completely destroyed by *McDonald* v. *Mabee,* 243 U. S. 90, a due process Fourteenth Amendment case.

Appellee, of course, takes issue and opens its discussion of the proposition to which it cites the case (A. B., 50) with the statement—

> "We gather implied authority from the decision of the court in this case for the validity of extra-territorial service upon absent citizens for a judgment in personam * * *."

After commenting on *Mabee* v. *McDonald* (A. B., 50) appellee makes the inexplicable, unfounded statement that this court reversed the Texas Supreme Court on the ground that Mabee was not a citizen of Texas at the time of the commencement of the suit in question.

There is not the slightest doubt as to Mabee's Texas citizenship. His intention to take up his citizenship and domicile in another state was unexecuted. This court said:

> (243 U. S. 91) "When the former suit was begun (the suit in question) the defendant Mabee was not domiciled in Texas but had left the state with intent to establish a home elsewhere. His family, however, still resided there. He subsequently returned to Texas for a short time and later established his home in Missouri" (Our parenthesis).

Appellee has already educated us that:—

> "The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign" (A. B., p. 20—from *Carlisle* v. *U. S.*, 16 Wall. 147).

Appellee then takes that part of the opinion of this court which carries the suggestion that in view of Mabee's domicile in the State of Texas, summons left at his last and usual place of abode might have been enough and deduces the following:

> (A. B. p. 53) "First, it recognizes that jurisdiction may be acquired over non-residents in other ways than by personal service within the territorial limits of the state or by appearance. This statement construed in the light of the opinion of the Supreme Court of Texas implies recognition of jurisdiction by virtue of the allegiance due from a citizen provided there is a foundation of physical power. We have shown that physical power, *coercive power*, exists in the case of citizens in four respects at least. Second, the language of Mr. Justice Holmes indicates that a summons left at the last and usual place of abode would have been enough because it is a method of substituted service most likely to reach the absent defendant. In

other words the notice, even though as far as the officials are concerned, is delivered within the territorial limits, is calculated to be forwarded and actually received outside of the territorial limits. *Substituted service is deemed personal service.*" (Our italics).

Neither of the two branches of appellee's statement is supported by the case. The first confuses the power to coerce with the power to seize the person. Both require the territorial exercise of power. The difference is in this: territorial coercion may be applied (if constitutionally applied) in the absence of citizens, whereas territorial seizure of the person, of course, requires the person's physical presence, or a reasonable theory which assumes his physical presence. The Walsh Act excludes the fact and all theories of physical presence by confining its operation exclusively to persons "beyond the jurisdiction of the United States."

Then there is the additional error of implying jurisdiction by virtue of allegiance "provided there is a foundation of physical power." Clearly, if there is a foundation of physical power (different from the power to coerce) jurisdiction by virtue of allegiance is unnecessary. Seizure of the person (or its civilized equivalent, territorial service) will meet the full initial jurisdictional requirement of due process.

The second branch of appellee's statement, above excerpted, is equally and patently off point. It argues *territorial domicile* and *territorial service* of substituted service, *which appellee advises us is deemed to be personal service.*

We have already shown that the Act does not contemplate service of either summoning process or of a notice (however it may be viewed) within the territorial jurisdiction of the United States, and that the Act takes no account of the domicile or residence of the absent citizen. This is conceded by appellee (A. B., p. 15).

The opinion of the Texas Supreme Court and Mabee's brief before this court, and we assume, the argument squarely presented the question whether sovereign control could substitute for the due process rule that jurisdiction *in personam* must be acquired by voluntary appearance or territorial service of process. *Mabee* v. *McDonald,* 107 Texas 139, 173-174 (175 S. W. 676); brief for defendant in error (in *McDonald* v. *Mabee*) page 7, vol. 57, Collected Briefs; See also our first brief, pp. 26-27).

The contention was based upon Mabee's status as a citizen of Texas, which status, as above pointed out, was inescapable from the facts of the case. Nevertheless, this court held that jurisdiction is power (the power to seize the person—*Michigan Trust Co.* v. *Ferry,* 228 U. S. 346, 353), and substitute methods for acquiring it must keep close to this basic principle of due process.

The direct control over the citizen from the power to seize and the remote extra-territorial control argued from jurisdiction by virtue of allegiance, are self-evident incongruities which cannot live together. The choice by this court, in *McDonald* v. *Mabee,* of jurisdiction through the power to seize the person leaves appellee's opening statement (A. B. 50) that this court impliedly approved extra-territorial service of personal summoning process, without a vestige of support.

Applying principles of the case to the cases at bar, it is at once perceived that everything done here is condemned. No substitute service of the subpoena was made upon appellant in the United States; there was no publication here of the subpoena; appellee had given up his domicile and residence in the United States two years before the Walsh Act was passed, approximately three years before the subpoenas were served in *200* and approximately four years before the subpoena was served in *201;* appellant never returned to this country (R. 200, pp. 18-19; R. 201, pp. 16-19). Appellee declined a tender

of the issue of appellant's domicile (R. 201, pp. 17-18), and admits, in its latest brief, before this court, that under the Act the domiciliary status of the absent witness is of no importance (A. B., p. 15).

The sole remaining question under the Act and under the procedure in the cases at bar then is: did the Government, in the absence of treaty, have the power to seize the witness "beyond the jurisdiction of the United States"? Appellee does not contend there is such power.

Appellee's South Dakota case.

Under the heading "Citizenship supports jurisdiction *in personam* upon extraterritorial personal service only" appellee (A. B., p. 56) cites *in re Hendrickson,* 167 N. W. 172 (1918), a South Dakota case which squarely holds that jurisdiction in personam, when authorized by statute, may be acquired by extra-territorial service of process.

In our previous reply brief we pointed out that the South Dakota Court based its decision on the doctrine of sovereign control, which it took from the reversed case of *Mabee* v. *McDonald* (our first reply brief, pp. 12-14). We pointed out that although decided a year after this court's decision in *McDonald* v. *Mabee,* the fact that no reference was made to the latter decision indicates that it was not brought to the attention of the South Dakota court. We also showed, by excerpt from the case of *Mabee* v. *McDonald,* that the doctrine of sovereign control was not intended to cover the extra-territorial exercise of power, and that the reason is apparent from the fact that the doctrine of sovereign control is an invention designed to circumvent the prohibition on extra-territorial exercise of power (our first reply brief, page 13).

Appellee's direct American authority for the acquisition of judicial jurisdiction *in personam* by virtue of sovereign control rests then on a trilogy of curious

and most unacceptable precedents—the genesis of the doctrine was in a dissenting opinion (*Raher* v. *Raher*, Iowa, 129 N. W. 494),—its fullest development was in a reversed opinion (*Mabee* v. *McDonald*, 107 Texas 139, 175 S. W. 676)—its last expression was in an opinion showing ignorance of the fact that the doctrine had predeceased it (*In re Hendrickson, supra*, So. Dak. 167 N. W. 172).

We close this branch of the subject by inviting attention to the facts which to us seem conclusive—(a) the Act does not base its powers upon allegiance, for it applies equally to *absent* aliens who owe no allegiance, and (b) the territorial principle applies to the United States government when it seeks to compel testimony of a citizen under an Act of Congress (*Robertson* v. *Railroad Labor Board*, 268 U. S. 619), from which it also follows that allegiance is not a valid jurisdictional factor in the similar matter before us.

Appellee does not meet the cases of this court relied upon by appellant.

We have already discussed appellee's analysis of *McDonald* v. *Mabee*, 243 U. S. 90; *Robertson* v. *Railroad Labor Board*, 268 U. S. 619; *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346 (this brief, pp. 11-15, 24-28). Appellee discusses other decisions of this court, also relied upon by us (A. B. pp. 56-69). The inadequacy of its treatment of these cases is illustrated by the fact that it nowhere considers the force to be attributed to the declaration of this court in *Toland* v. *Sprague*, 12 Peters 300, that it could not be in the contemplation of Congress to authorize the extra-territorial service of process, or to the declaration of this court in *Pennoyer* v. *Neff*, 95 U. S. 714, that

> (p. 726) "The fact that the defendants in that case (*Cooper* v. *Reynolds*, 10 Wall. 308) had fled from the state or had concealed themselves, so as

> not to be reached by the ordinary process of the court, and *were not non-residents* was not made a point in the decision. The opinion treated them as being without the territorial jurisdiction of the court; and the grounds and extent of the authority over persons and property were considered, when they were not brought within the jurisdiction by personal service or voluntary appearance * * * to the doctrine declared in the above citation (from *Cooper* v. *Reynolds, supra*) he (Mr. Justice Field) agreed, and he, (Mr. Justice Field) may add that *it received the approval of all the judges.*" (Our italics and parenthesis),

or to the root principle which was made part of due process by *Pennoyer* v. *Neff, supra,* "that no state can exercise direct jurisdiction and authority over persons or property without its territory" or to the numerous other decisions of this court which in one form or another applied the root principle to Federal judicial districts, to the states, to the United States, to foreign countries, to absent citizens and to absent non-resident (our first reply brief, p. 18).

Its discussion of *Johnson, in re,* 167 U. S. 120, cited by us, among other cases, at page 25 of our first brief, in support of the proposition that "jurisdiction *in personam* is 'acquired' either by voluntary appearance, or service on the person within the territorial jurisdiction of the court" is typical. Appellee states:

> (A. B. p. 69) "Of course where the jurisdiction needed is such as will bring the person to the bar of the court to confront witnesses against him and to receive a sentence of the court, actual physical power over the accused may be necessary."

Is there any difference between the jurisdiction needed to bring a person to the bar of the court to confront witnesses and to bring him to the bar of the court to testify?

Miscellaneous irrelevant matters.

As to appellee's citations (A. B., pp. 20-21) defining the duty of allegiance, such as

Carlisle v. *United States*, 16 Wall. 147;
Minor v. *Happersett*, 21 Wall. 162;
Miller on the Constitution of the United States, pp. 294-295, and

As to its citations of authorities to the point that legislation may affect absent citizens (A. B., 21-30), such as:

Rose v. *Himely*, 4 Cranch 241;
The Appollon, 9 Wheat. 362;
Willoughby on the Constitution, p. 247, sec. 120;
Charles Cheney Hyde: International Law, vol. I, p. 424, para. 240;
Cook v. *Tait*, 265 U. S. 47;
United States v. *Bowman*, 260 U. S. 94.

We pass these with the observation that not one is authority for the extra-territorial exercise of power or for the doctrine of allegiance as a substitute for the acquisition of judicial jurisdiction *in personam* by voluntary appearance or territorial service of process, or for the proposition that a subpoena commanding the testimony of an absent citizen is a mere notice. They all have to do either with the assertion of abstract principles or with territorial exercise of jurisdiction.

Legislation, of course, may be designed to affect absent citizens, but the exercise of the power authorized is confined exclusively within the territorial limits of the nation. This was emphasized in *Rose* v. *Himely*, 4 Cranch 241; *United States* v. *Rodgers*, 150 U. S. 249; *The Hamilton*, 207 U. S. 398; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347.

For example, had appellee continued with the next sentence of its excerpt from *Rose* v. *Himely*, *supra*, 4 Cranch 241 (A. B. 21) it would have noted:

(p. 279) *"It is not easy to conceive a power to execute a municipal law or to enforce obedience to that law without the circle in which that law operates. A power to seize for the infraction of a law is derived from the sovereign, and must be exercised, it would seem, within those limits which circumscribe the sovereign power."* (Our italics.)

The following also appears in appellee's excerpt (A. B.; p. 22) from *Willoughby on the Constitution:*

(p. 247, Sec. 120) "From the viewpoint of international relations, as we have just seen, the law of one state is not permitted by other states to operate outside of the territorial limits of the state which promulgates it, and, therefore, although claiming a legal authority over an individual outside of such limits, a state will not be permitted by other states to exercise it against the consent of the state within whose limits the individual is situated. But that does not render impossible the existence of or invalidate such a claim, for, when, *if ever, such an individual is apprehended within the territory of the state claiming authority over him he may be held responsible for acts committed while abroad.*"

The invalid consular function.

Appellee argues the validity of the consular function under headings including the following:

"There is no allegation or proof by the appellant that France objects to, or the laws of France forbid, service of a subpoena by messenger or by consul." (A. B., p. 88),

and

"Even if the manner of serving the subpoena were contrary to international law or French law, the Walsh Act would not be unconstitutional." (A. B., p. 90).

We agree with both of these assertions. We agree that appellant could not, if he wished to, take advantage

of any injury to France resulting from the operation of the Walsh Act. He makes no such claim. We do not place primary reliance on international law. We have cited international law to show that it accords with our own constitutional law, which, in the last event, must control the question.

As to appellee's main heading—"Service by a consul is valid even if no treaty deals with the subject": Appellee goes on the theory that the service of the subpoena under the Act is a ministerial function; that it is the character of function which is recognized by international law as proper for consuls to perform in the absence of treaties—this by reason of the tacit consent of the foreign nations.

Appellee's own citations show that our consular regulations of 1870 (promulgated by the State Department) permitted the service of process by consuls on the theory that in so doing the consul was acting, not as an agent of the Federal Government, "but simply as a citizen of the United States whose local position and character render him available to his fellow citizens for such services as might have been rendered by a private individual", *that general permission for the performance of this function was withdrawn because it resulted "in the loss of prestige of the official or employee who delivered the documents as well as in the prestige of the consular service generally."* (A. B., p. 85).

The Walsh Act, however, does not authorize the consul to serve the subpoena in a capacity disassociated from his official status (see Act). That the same function might be performed by a private citizen (if it might), through the mails (if it might), by cable (if it might), or by radio (if it might), has not the slightest bearing. The point is not how it might have been done under a different act, but was it done validly—may a consul do it validly pursuant to the Act in question.

The letter of the Honorable, Wilbur J. Carr, Assistant Secretary of State, to counsel for appellee, as ex-

cerpted in appellee's brief (A. B., p. 84), is significant in the following: (a) it expresses the opinion of the writer that foreign governments ought not to object to the service of process on their soil by consuls; (b) no objection has been made in the cases at bar; (c) there was no offence to the dignity or sovereignty of France; (d) the consul did not act as a consul, but as a messenger.

This avoids the constitutional point entirely; expresses a hope, the soundness of which cannot be determined until there is objection by foreign nations, which the Assistant Secretary states has not been made; assumes that the service of the subpoena is the service of a mere notice and thus assumes the main point at issue; overlooks the provisions of the Act which make the service a consular function and not that of a messenger.

It is not convincing to describe as a "messenger" a public official representing the United States government and charged with the duty of delivering the solemn commands of United States courts, of seeking out absent citizens in foreign countries, of carrying, tendering and accounting for substantial cash sums for the witnesses' travel and attendance expenses, and of making valid service of the process and proper returns thereon.

It takes a long course of tacit consent to ripen a principle of international law. The two modern exceptions referred to in appellee's brief, to the general prohibition established by the consular regulations on the service of process are, the service of notice under the Naturalization Act, and the service of subpoenas under the Walsh Act (A. B., 85-86). Neither of these practices have attained sufficient antiquity to mature a custom acceptable to international law, and appellee produces no authority to the contrary. The Naturalization Act was passed in 1906 and the Walsh Act in 1926. The service of subpoenas and of the orders to show cause in the cases at bar represents the only exercise of a consular function under the Walsh Act.

To describe the consular function under the Act as ministerial does not advance the discussion. The great bulk of consular functions are ministerial. If there were occasion to label the consul he might be termed a commercial agent. *The Anne*, 3 Wheaton 435; *Hyde International Law*, vol. I, p. 794. In fact our Federal statutes prohibit our consuls from exercising diplomatic functions (sovereign powers) unless expressly authorized by the President, *U. S. C. Tit.*, 22 sec. 105.

But, assuming for the moment, that the service of the subpoena is a ministerial act. That does not take it out of the treaty making power. The taking of an oath or an acknowledgment, is a ministerial act. As to this, *Hyde* says:

> (*Hyde on International Law*, Vol. I, p. 825) "It is of the highest importance that a consular officer should be permitted to perform certain notarial acts within his consular district. *Numerous conventions to which the United States is a party confer that privilege. According to an agreement of 1910*, consular officers may, 'so far as may be compatible with the laws of their own country, take, at their offices, their private residences, at the residence of the parties concerned, or on board ship, the depositions of the captains and crews of vessels of their own country and all passengers thereon, as well as the depositions of any citizen or subject of their own country.'" (Our italics.)

In discussing the *Act of Congress of August, 1856, Section 24*, now substantially embodied in *Section 1750 of the Revised Statutes*, relating to the crime of perjury by false oaths before United States consuls, John Bassett Moore, in his celebrated "Report on Extra-territorial Crime and the Cutting Case" says:

> (*Foreign Relations* 1887, p. 800) "It is observed that the Act relates solely to certain officers, known to international law, who, *upon recognition and with the consent of the governments of foreign countries*, discharge there the functions of official

> representatives of the Government of the United States. *One of those functions for the performance of the official acts enumerated in the Statute of 1856, namely, the taking of oaths, etc., and the performance of notarial acts, for use in the United States* * * *." (Our italics.)

The activities of consuls, notarial and otherwise, have always been the subject of meticulous definition in the agreements between nations. The consummation of such agreements has occupied the attention of this Government from its beginnings. Thus, for example, in February 1778, we concluded a *Treaty of Amity and Commerce,* with France (*Malloy's Treaties,* Vol. I, p. 468) in which the following appears:

> "The two contracting parties grant mutually the liberty of having each in the ports of the other, consuls, vice-consuls, agents, and commissaries, *whose functions shall be regulated by a particular agreement.*" (Our italics.)

The care with which those functions were defined and limited is illustrated by the *"Convention Defining and Establishing Functions and privileges of Consuls and Vice-Consuls,"* between the United States and France, concluded in November 1788 (the "particular agreement" above referred to) (*Malloy's Treaties,* Vol. I, p. 490).

Art. VIII. of the Convention (p. 494) authorizes the consuls of the two nations to exercise police over the vessels of their respective nations; authorizes them to exercise jurisdiction in civil disputes arising on such vessels; and to carry out those powers, authorizes them to board such vessels; and then, so there might be no possible misunderstanding as to the territorial field for the operation of those functions, this article goes on to say—*"well understood that the functions hereby allowed shall be confined to the interior of the vessels.* * * *"* (Our italics.)

Art. IX. of the Convention (p. 494) permitted consuls of the two nations *to cause* the arrest of the deserting captains of their ships, and the procedure was for them *"to address themselves to the courts" • • • "to demand the said deserters in writing."* (Our italics.)

We have examined every consular convention and treaty to which the United States is a party, reported in Malloy's Vols. I and II, and in the supplemental volume III, and find every one of them equally meticulous in defining the exact functions of consuls and the place where they may be performed.

Congress has been equally meticulous in conforming its legislation with respect to consular functions to existing or possible future treaties. Thus, on April 4, 1792, Congress passed—

> *"An Act to carry into full effect the Convention between the Kingdom of the French and the United States, entered into for the purpose of defining and establishing the functions and privileges of their respective consuls and vice-consuls."* (Our italics.)

We excerpt the following from this Act which demonstrates that ministerial functions were the subject of the Convention referred to:

> "And where by any article of the said Convention, consuls and vice-consuls of the Kingdom of the French, are entitled to the aid of the competent executive officers of the country in the execution of any precept, the marshals of the United States, and their deputies, shall, within their respective districts be the competent officers, and shall give their aid according to the tenor of the stipulations.
>
> • • • • • • • • •
>
> Sec. 2. Be it enacted by the authority aforesaid, that they shall have the right in the ports or places to which they are or may be severally appointed, *of receiving the protests or declarations,* which such captains, masters, crews, pass-

engers and merchants as are citizens of the United States, may respectively chuse to make there; * * * and the copies of said act duly authenticated by said consuls or vice-consuls, under the seal of their consulates, respectively, shall receive faith in law * * * it shall be their duty where the laws of the country permit, *to take possession of the personal estate left by any citizen of the United States,* other than seamen belonging to any ship or vessel who shall die within their consulate; * * * *they shall inventory the same;* * * * *shall collect the debts due to the deceased;* * * * *shall sell at auction* after reasonable public notice such part of the estate as shall be of a perishable nature; * * * *shall also, as soon as may be, transmit to the Secretary of State an inventory* of the effects of the deceased taken as before directed.

And be it further enacted, that the said consuls and vice-consuls, in cases where ships or vessels of the United States shall be stranded on the coasts of their consulates, respectively, shall * * * *take proper measures* * * * *for* * * * *saving the said ships or vessels,* and cargoes and appurtenances, as *for storing and securing the effects* and merchandise saved, and for taking an inventory * * *." (Our italics.)

As to judicial jurisdiction exercised by consuls: turning to *Title 22* of the present *United States Code* dealing with Foreign Relations, it will be noted that the preamble of Chap. 2 on "Consular Courts", states:

Sec. 141—Judicial authority generally—

"*To carry into full effect the provisions of the treaties* of the United States with certain foreign countries, * * *"

Sec. 143 (tit. 22, U. S. C.) states:—

"Such officers are also invested with all the judicial authority *necessary to execute the provisions of such treaties,* * * *"

Sec. 146 (U. S. C. tit. 22) commences:—

> "In order to organize and carry into effect the system of jurisprudence *demanded by such treaties, respectively,* * * *"

Sec. 163 (U. S. C. tit. 22), commences:—

> "The jurisdiction *allowed by treaty to the ministers* * * *"

Sec. 177 (U. S. C. tit. 22) states:

> "The provisions of this Chapter relating to the jurisdiction of consular and diplomatic officers * * * shall extend to any country of like character *with which the United States may, after July 1870, enter into treaty obligation.* And whenever the United States shall negotiate *a treaty* with any foreign government, *in which the American Consul General or Consul shall be clothed with judicial authority* * * * etc."

Sec. 191 (U. S. C. tit. 22):—

> "A Court is hereby established * * * which shall have exclusive jurisdiction in all cases * * * whereof jurisdiction may have been exercised * * * by United States Consuls * * * *by law and by virtue of treaties between the United States and China.*"

The long established use of treaties to authorize the exercise of limited and exact consular functions, whether administrative or otherwise, and auxiliary legislation with respect thereto in itself confesses their necessity, and affords a practical and contemporaneous legislative and executive interpretation of the constitutional limitation here contended for on the extra-territorial exercise of official authority. If there were doubt as to the constitutional necessity of treaties to authorize the consular functions prescribed in the Act, this contemporaneous and practical construction by the Executive and Legisla-

tive branches of the government would settle the construction in favor of the necessity. *Knowlton* v. *Moore*, 178 U. S. 41; *McPherson* v. *Blacker*, 146 U. S. 1; *Cooley* v. *Board of Wardens*, 12 How. 299; *Stuart* v. *Laird*, 1 Cranch 299; *Minor* v. *Happersett*, 21 Wall. 162.

We are content with the declaration of this court in *In re Ross, Petitioner*, 140 U. S. 453, that:

> (p. 462) "The Constitution can have no operation in another country. When, therefore, the representatives or officers of our Government are permitted to exercise authority *of any kind* in another country it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other."

The breadth of this language covers the consular function, no matter how it may be described.

Since the valid consular function, under our Constitution, must be authorized by treaty, it follows that the Walsh Act, which is not auxiliary to treaties existing or prospective, violates the treaty-making power provided in Art. II, Sec. II, Cl. 2 of the Constitution and is void.

Summary.

At the outset we excerpted appellee's admissions that under the Constitution judicial power cannot be exercised extra-territorially without the consent of treaties (this brief, pp. 3-4). Appellee undertook its necessary correlative burden of showing that the service of the subpoena is the service of a mere notice, and does not involve extra-territorial exercise of power.

> *We think we have now demonstrated that no branch of appellee's argument can be sustained;*
>
> *that the Act, in derogation of the common law, therefore, to be strictly construed, does not support appellee's theory, but on the contrary makes it clear that the subpoena is the command of a*

Federal court, the validity of which depends entirely upon its actual extra-territorial service;

that appellee's rem and quasi in rem cases are inapplicable because the Walsh Act does not contemplate the seizure of property, or of a status or res to be litigated, as a condition precedent to the service of the subpoena, and that there is no status or res which can be affected by any judgment of the court in the subpoena procedure;

that appellee's implied consent cases are inapplicable because they contemplate territorial service of the summoning process upon the defendant's agent within the territorial jurisdiction, whereas service of the subpoena under the Walsh Act is confined exclusively to points "beyond the jurisdiction of the United States";

that its domicile cases are inapplicable because they assume the presence of the defendant within the state and require territorial domicile, and territorial service, constructive or substituted, whereas the Walsh Act takes no account of the citizen's domicile, and exclusively applies to service of process and to persons "beyond the jurisdiction of the United States";

that the doctrine of recall cannot change the subpoena into a notice because that power, to the extent which may be constitutionally delegated (if at all) to the judiciary, becomes to that extent judicial and must be limited in its execution by the established rules of due process governing the service of a judicial summons in personam;

that Conflicts, Removal of Judgment, and Private International Law authorities are inapplicable because they are in conflict among themselves, and because they take no account of domestic constitutional principles;

that English authorities as precedents for the extra-territorial service of process based upon English common law are inapplicable because we have our own common law which is committed to the territorial principle, and because the rules of judicial due process of this nation cannot be affected by precedents illustrative of the unbridled power of the omnipotent English Parliament be-

yond the challenge of English courts or English citizens;

that the doctrine of sovereign control as a basis for the acquisition of judicial jurisdiction in personam has been rejected by this court in a case where it was squarely raised, was not considered in another case involving the reach of Federal process where Congress made it the citizen's duty to testify, and because the doctrine from its very nature is antithetical to that which this court has declared is necessary,—the existence of the power to seize the person;

that this court has held and practice shows that all valid consular functions must be authorized by treaty; that the act is not in aid of treaties.

Appellant's position.

We confidently return to our own position that under the Walsh Act the service of the subpoena by a United States Consul violates the treaty-making power provided by the Constitution; is an extra-territorial exercise of power, which, because it is unauthorized by treaty, cannot be reconciled with the constitutional status of the nation as an equal sovereignty, and is condemned by the law of judicial due process that jurisdiction *in personam* must be acquired; that it can only be acquired by territorial service of process or by voluntary appearance.

REPLY B

The Act does not provide valid jurisdiction to punish.

Appellee advances a new theory on jurisdiction for the punitive procedure. In the Court of Appeals it argued that it is *quasi in rem.* (Its brief there, pp. 55, 86). In its first brief here, it argued that the procedure is *in rem* or *quasi in rem.* (Its first brief here, p. 25). Now appellee says the method of acquiring jurisdiction to try the criminal contempt action and to pass judgment therein is

"double barreled", that it is *quasi in rem* or *in personam*. Thus we have a new mongrel of the law which at one and the same time is three different things, *in personam*, *in rem* and *quasi in rem*.

The Act contemplates *quasi in rem* procedure to try the offense and pass judgment thereon, because:

1. There is no mandatory requirement that the defendant shall be served with the citation to appear.

2. There is no requirement that the service of the citation must be proved.

3. A judgment under the Act may be had "upon service by publication only" (Act, sec. 8).

4. The Act makes attachment of property followed by publication of the citation a mandatory condition precedent to punitive procedure. There is no provision for forwarding the order to show cause for service, or for publishing the order to show cause, until after the Marshal has made a levy on property (Act, sec. 6).

5. The trial is on the issue of criminal contempt and has no bearing on property questions (Act, sec. 7).

Appellee promises to demonstrate that the Act contemplates an *in personam* method of acquiring personal jurisdiction (A. B., p. 95). The promise does not materialize. It is stated that *Section 5* is "permissive" (A. B., p. 96), but that means nothing more than that which is clear from the language of the section, that the court may or may not elect to proceed with the punishment procedure.

Appellee fears that if the method of acquiring jurisdiction is *quasi in rem*, a recusant witness "could avoid punishment by the simple expedient of removing his property from the United States and returning home where no consul could serve him" (A. B., p. 96). If this alarm could materialize, it would only represent an additional disability resulting from the extraordinary device of making the seizure of property a condition precedent to punishment for a criminal offense.

Appellee urges that "criminal contempt is not a crime within the *6th Amendment,* or common understanding, but is *sui generis* (A. B., p. 99). We have not said that criminal contempt is a crime *within the 6th Amendment,* and we have not denied that *inherent power* contempt cases are *sui generis.* We do not care whether the offense under the Act is called a crime or a criminal offense. It is certainly the latter. This court has said so. *Michaelson* v. *United States,* 266 U. S. 42, 66-67; *Ex parte Grossman,* 267 U. S. 87, 116.

Appellee argues that since criminal contempt proceedings are *sui generis* no fixed formula of procedure is necessary under the Constitution (A. B., p. 96). We do not say that a fixed formula of procedure is necessary for *inherent power* contempt cases. We *do* say that when a special statute in derogation of the common law fixes the formula it must be judged in accordance with its terms. *Galpin* v. *Page,* 18 Wall. 350, 367, 370, 371, 372. "Under the assumption of a special power it cannot be made general by any supposed necessity, beyond the provisions of the Act." (*Boswell's Lessee* v. *Otis,* 9 How. 336, 349).

Proceeding further, appellee states:

> (A. B., p. 97) "The procedure for acquiring jurisdiction may be *quasi in rem* and the incidents, so far as matters of formality are concerned, may be interpreted according to principles applicable to such *sui generis* proceedings."

We are not discussing "incidents" or "matters of formality". The matter for consideration is whether the acquisition of jurisdiction to punish criminal contempt of court by a specified *quasi in rem* method is valid under the Constitution.

In the next sentence appellee says:

> (A. B., p. 97) "The act is declaratory of inherent power of Federal courts, *except so far as novel procedure is* expressly prescribed." (Our italics.)

The validity of the "novel procedure" is the precise point at issue—not the inherent power of Federal courts.

Appellee continues to destroy the relevancy of its arguments with the following:

> (A. B., p. 117) "* * * that the Walsh Act is declaratory *except as it extends the jurisdiction of the court and regulates procedure;* that established principles of jurisdiction and practice may prevail *except as modified by the Act,* and that *except as modified by the Act,* no fixed formula of procedure is necessary. It is sufficient that the procedure, as regulated by the Act, does not deny due process. There is nothing in the nature of the offense which precludes the use of *quasi in rem* procedure." (Our italics.)

We agree that the procedure must not deny due process. It denies due process because the offense is personal, the charge is personal, the issue is personal, the judgment is personal, and the *quasi in rem* procedure, attempting, as it does, to acquire jurisdiction of that which is truly *in personam,* violates the requirement of due process of territorial service or voluntary appearance. *Pennoyer* v. *Neff,* 95 U. S. 714.

The theory apparently is that because inherent power contempt cases are *sui generis* with certain relaxations in procedure, that everything that may be done, including that which may be done by Congress with reference to the subject of contempt, is permissible. This, of course, is not correct. It argues out of existence all due process protection in connection with the offense.

Even inherent power contempt cases are *sui generis* only to the extent that courts have found it necessary to make them so in order to protect their very existence. *Michaelson* v. *United States,* 266 U. S. 42, 65-66; *Ex parte Grossman,* 267 U. S. 87, 117-118.

Federal courts have never found it necessary in the protection of their existence to adopt *quasi in rem* procedure to acquire jurisdiction to punish citizens beyond

the territorial limits of the United States who failed to respond to process. They have uniformly condemned extra-territorial service of process, not only because of constitutional limitations, but on principles of common law. *Pennoyer* v. *Neff*, 95 U. S. 714; *Robertson* v. *Railroad Labor Board*, 268 U. S. 619.

Appellee intimates an analogy between the Clayton Act and the Walsh Act (A. B., p. 99). The Clayton Act provided a limited regulation of the inherent power of Federal courts. This court had the Clayton Act before it in *Myers* v. *United States*, 264 U. S. 95. The opinion states:

> (p. 103) "To disobey a judicial order is not declared criminal by the Clayton Act. It recognizes that such disobedience may be contempt *and having prescribed limitations, leaves the court to deal with the offender.* * * *. The Clayton Act says nothing about venue in contempt proceedings; leaves it as theretofore. The power of the court below to issue the enjoining order is not questioned. By disobeying the order, plaintiffs in error defied an authority which that tribunal was required to vindicate. *It followed established practice, as modified by the statute* * * *." (Our italics.)

The Walsh Act, however, provides an entirely new power and a new, express and specific procedure to enforce that power. The power is not inherent, it has never been claimed to be inherent; it is not regulatory of anything inherent; because it is statutory and not inherent it cannot be *sui generis*.

Appellee takes exception to the point we make that despite Federal Conformity Acts this court has refused to permit attachment of property to serve as a method of acquiring jurisdiction *in personam*. The Acts of Congress we have in mind are:

The Act of May 8, 1792, entitled "An Act for Regulating processes in the Courts of the United States * * *"

and The Conformity Attachment Act of June 1, 1872 (c. 255, sec. 6, 17th Stat. 197; R. S. 915; U. S. C. Tit. 28, sec. 726).

Section 2 of the Act of May 8, 1792, is as follows:

> "Sec. 2. And be it further enacted, that until provision shall be made, and except where by this Act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, *and modes of process shall be the same in each state respectively as are now used or allowed in the supreme courts of the same* * * *" (Our italics).

The Conformity Attachment Act of June 1, 1872, (*supra*), provides:

> "In common law causes in the district courts the plaintiff *shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof;* and such district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process. Similar preliminary affidavits or proofs, or similar security, as required by such state laws, shall be first furnished by the parties seeking such attachment or other remedy." (Our italics).

Despite the existence of these Federal statutes, the language of which seems very clear, this court and the lower Federal courts have continued to rule that attachment cannot be used to acquire jurisdiction *in personam;* that attachment is but an incident of a suit; that unless there is jurisdiction over the person of the defendant, the attachment must fall. See for example: *Toland* v. *Sprague,* 12 Peters 300, 329; *Picquet* v. *Swan,* 5 Mason 35; *Big Vein Coal Co.* v. *Read,* 229 U. S. 31; *Laborde* v. *Ubarri,* 214 U. S. 173.

Appellee does not controvert the holdings of these cases, but says that it would be different if Congress legislated the necessary authority. We answer by inviting attention to the language of the acts of Congress above excerpted.

Appellee again picks up the *dictum* in *Big Vein Coal Co.* v. *Read,* 229 U. S. 31, that:

> (p. 38) "If Congress had intended any such radical change, it would have been easy to have made provision for that purpose and doubtless a method of service by publication in such cases would have been provided."

Mr. Justice Day was referring to actions essentially *quasi in rem.* We think it fair to suggest that if Mr. Justice Day had been thinking of the "radical change" involved in authorizing *quasi in rem* procedure for an action purely *in personam,*—having to do with the punishment of a criminal offense—he would have said so.

Be that as it may, if service by publication under any circumstances to acquire jurisdiction *in personam* were conceivably within the power of Congress to authorize, it would have to adhere closely to the rule of *McDonald* v. *Mabee,* 243 U. S. 90, and *Michigan Trust Co.* v. *Ferry,* 228 U. S. 346, that jurisdiction is the power to seize the person. The procedure would have to be limited to defendants within—and not "beyond the jurisdiction of the United States."

REPLY C

The Act does not provide for notice of the offense or the claim against the property.

Appellee furnishes a handy key to quick solution of the question involved. It states:

> (A. B., p. 129) "Contrary to the assertions of the appellant (B. 34, 35) that special counsel for the

Government in these cases, by the form and conditions of the orders to show cause involved in the cases at bar, interpreted the Act as not requiring notice to the defendant of his alleged offense or of the alleged claims against the property, *we assert that the only proper inference from the form and conditions of the orders to show cause involved herein, is that special counsel for the Government construed them as giving the appellant all necessary notice.*" (Our italics.)

When we know, therefore, the nature of the notice which appellee interpreted the Act to require, we have appellee's interpretation of the Act.

The sole official notice to appellant in both actions was as follows:

(R. 200, pp. 11-12)

"ORDER FOR APPEARANCE, &C.,

Filed November 16, 1927.

* * * * * * * * *

And now, November 16th, 1927, upon consideration of the petition heretofore filed by Peyton Gordon, United States Attorney for the District of Columbia, Atlee Pomerene and Owen J. Roberts, Special Counsel for the United States of America, it is ordered as follows:

1. The said Harry M. Blackmer is hereby directed to appear before this Court on Friday, January 6, 1928, at ten o'clock A. M., to show cause why he should not be adjudged guilty of contempt and be punished accordingly.

2. That the property of the said Harry M. Blackmer within the United States, of the amount and value of $100,000, be levied upon and seized by the Marshal of this Court and held to satisfy any judgment that may be rendered against the said Harry M. Blackmer in this proceeding.

3. That the Marshal of this Court is hereby directed upon making such levy to forward to the Consuls of the United States at Paris, France, at

Nice, France, and at any other places in France or in any other countries where the said Harry M. Blackmer may be, a copy of this order, with the request that such Consul or Consuls make service of the same personally upon the said Harry M. Blackmer; and further that the said Marshal shall cause this order to be published in The Washington Evening Star, a newspaper of general circulation in the District of Columbia once each week for six consecutive weeks, in accordance with the provisions of Section 6, c. 762, of the Act approved July 3, 1926, 44 Stat. 835.

By the Court:

F. L. SIDDONS,
Judge."

(R. 201, pp. 11-12)

"ALIAS ORDER TO SHOW CAUSE.

Filed Dec. 26, 1928.

* * * *

Upon motion of the United States of America, the defendant, H. M. Blackmer, is cited and admonished to appear before this court on the 25th day of February, 1929, at 10 o'clock A. M. and show cause, if any he has, why he the said H. M. Blackmer, should not be adjudged guilty of contempt of court in neglecting, failing and refusing to obey the subpoena heretofore issued by said Court and served upon him to appear before this Court as a witness in the case of the United States *vs.* Harry F. Sinclair and Albert B. Fall, Criminal No. 43,324 on the docket of this Court, the circumstances of which are very fully set out in said motion of plaintiff filed herein and why the said H. M. Blackmer should not be fined and punished therefor according to law.

It is ordered that the Marshal of this District levy upon and seize the property of the said H. M. Blackmer within the United States of the amount and value of One Hundred Thousand Dollars ($100,000.00), or so much thereof as may be found, and hold the same until further ordered by the Court for the purpose of satisfying any judgment

that may be rendered against H. M. Blackmer in this proceeding.

It is further ordered that the Marshal of this District, upon having made such levy and seizure, shall forward to the Consul of the United States at Paris, France, and to the Consuls of the United States at any other place in France or in any other countries where said H. M. Blackmer may be, a copy of this order with a request that such Consuls, or any one of them, shall make personal service thereof upon said H. M. Blackmer and make prompt return thereof to the Clerk of this Court and that said Marshal shall make personal service of this order upon said H. M. Blackmer, if he is found in the United States and make prompt return thereof to the Clerk of this Court, and that said Marshal, upon having made such levy and seizure, shall cause this order to be published in the Evening Star, a newspaper of general circulation in the District of Columbia, once a week for six consecutive weeks, commencing as soon as possible after such levy and seizure and cause the editor or publisher of such newspaper to make due return thereof upon the completion of such publication.

WILLIAM HITZ,
Judge.

Dec. 26, 1928.

Approved:
LEO A. ROVER,
United States Attorney for the District of Columbia.

ATLEE POMERENE,
Special Counsel."

In 200, appellee, therefore, interpreted the Act as requiring nothing more than a bare citation to appear and to answer an unspecified contempt; as not requiring any statement of the charges against appellant's seized property. In 201, appellee interpreted the Act as requiring no more than the specification of a contempt alleged to have arisen from disobeying an undescribed subpoena in

the face of the fact that three subpoenas had been served upon appellant in two different actions, and none of which identified itself with the Act. (R. 200, pp. 7, 9; R. 201, p. 4).

It has been held that a general citation to appear is not notice of the specific object of the inquiry. We refer to *In re Rosser*, 101 Fed. 562 (C. C. of A. 8th Circuit, 1900; Op. by Circuit Judge Sanborn).

Rosser was committed to jail *for contempt of court* for failing to obey the order of a referee in bankruptcy to turn over to the trustee the sum of $2500 alleged to have been a part of Rosser's estate when he was adjudged a bankrupt, and to have been in his possession when the order for him to deliver it to the trustee was made.

The order followed a hearing *to which Rosser had been cited to appear* (and at which he did appear) and be examined under *Section 21* of the Bankrupt Act, which among other things provides,—"A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order, require any designated person, *including the bankrupt* * * *, to appear in court or before a referee * * *, *to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of* administration * * *." (U. S. C. tit. 11, sec. 44).

The citation, however, did not inform Rosser that the $2500 matter would be inquired into, although as is evident from the foregoing excerpt from the Bankrupt Act, examination as to the $2500 was clearly within the general scope of permitted inquiries.

Rosser challenged the order of commitment on the ground that the citation to appear did not put him on notice that the proceedings would include examination with reference to the $2500, and *that the denial of such notice was denial of due process.*

The case, therefore, squarely involved the questions whether a general citation to appear without notice of the

specific matter to be inquired into, can be a proper foundation for judgment of guilty of contempt, and correlative to that the question,—What is a sufficient notice?

The Court of Appeals sustained Rosser's contention, vacated and annulled the judgment of contempt and commitment, and in the course of its opinion said:—

> (pp. 567, 568) "The basic principle of English jurisprudence is that no man shall be deprived of life, liberty, or property without due process of law, without a course of legal proceedings according to those rules and forms which have been established for the protection of private rights. Such a course must be appropriate to the case and just to the party affected. It must give him notice of the charge or claim against him, and an opportunity to be heard respecting the justice of the order or judgment sought. *The notice must be such that he may be advised from it of the nature of the claim against him, and of the relief sought from the court if the claim is sustained.* And the opportunity to be heard must be such that he may, if he chooses, cross-examine the witnesses produced to sustain the claim, and produce witnesses to refute it, if a question of fact is in issue, and, if a question of law is presented, the opportunity to be heard must be such that his counsel may, if they desire, argue the justice and propriety of the judgment or order proposed. Judicial orders or judgments affecting the lives or property of citizens in the absence of such a notice and opportunity to the party affected are violative of the fundamental principle of our laws, and cannot be sustained. *Gentry* v. *U. S.* (C. C. A.) 101 Fed. 51; *Burton* v. *Platter,* 10 U. S. App. 657, 663, 4 C. C. A. 95, 99, 53 Fed. 901, 905; *Windsor* v. *McVeigh,* 93 U. S. 274, 277, 278, 23 L. Ed. 914; *Capel* v. *Child,* 2 Cromp. & J. 558, 574; *Hovey* v. *Elliott,* 167 U. S. 409, 414, 416, 446, 17 Sup. Ct. 841, 42 L. Ed. 215; *Galpin* v. *Page,* 18 Wall. 350, 368, 21 L. Ed. 959; *Underwood* v. *McVeigh,* 23 Grat. 409, 413; *Henry* v. *Carson,* 96 Ind. 412; *Hovey* v. *Elliott,* 145 N. Y. 126, 39 N. E.

841; *Taussig's Ex'rs* v. *Glenn*, 4 U. S. App. 524, 541, 2 C. C. A. 314, 318, 51 Fed. 409, 413; *Merrill* v. *Rokes*, 12 U. S. App. 183, 188, 4 C. C. A. 433, 435, 54 Fed. 450, 452."

* * * * * * * *

(pp. 568, 569) "It is an axiom of pleading and practice that one may not bring a suit for one cause of action and recover a judgment for another, much less may one recover an order or judgment for money and property without any suit or notice of the claim upon which it is founded. *Gentry* v. *U. S.* (C. C. A.) 101 Fed. 51. In the case in hand no notice was given to the bankrupt that any hearing would be had upon any claim that he should be required to pay over the $2,500 in controversy before the order to that effect was made. No order to show cause why he should not pay it was made or served upon him before the absolute order for its payment was presented to him. No opportunity was afforded him to be heard upon the questions it presents. He was cited to appear and be examined under section 21 of the bankrupt act, and his testimony and that of various other witnesses were taken before the referee upon that citation, *but no notice was served upon him that the claim, which culminated in the order for the payment of the $2,500, was made or was in issue at that examination,* or that the testimony there elicited was taken for the purpose of establishing that claim, and no opportunity was presented to him to produce witnesses in his defense or to be heard upon the issues of fact or of law which the issue of the order involved. *Such a proceeding lacks every element of due process of law. It contains no notice to the party affected of the claim against him, or of the proposed action upon it, no opportunity to contest the questions of fact which it presents by the cross-examination of the claimant's witnesses or the presentation of his own, and no chance to be heard upon the questions of law which it involves. It considers without notice, condemns without hearing, and renders judgment without trial. The order of the referee was unlawful and void.*"

(p. 569) *"The fundamental error in all these proceedings is that there was no notice to the bankrupt, either before the referee or before the court, of any hearing upon the claim of the trustee that he had $2,500 of the bankrupt estate in his possession which the trustee asked the referee or the court to order him to pay over, and there was no opportunity for him to be heard upon the questions of fact and of law which that claim presented."* (Our italics).

This court in *In re Wood and Henderson*, 210 U. S. 246 (1908; Op. by Mr. Justice Day), expressly approved the language of Judge Sanborn in the *Rosser* case, *supra*, as follows:

(pp. 254, 255) "The course of legal proceedings necessary to be had to affect private rights is well stated by Judge Sanborn in *Rosser's* case, cited. He says, at page 159, Am. Bankr. R. and page 567, 101 Fed. Rep.:

> 'Such a course must be appropriate to the case, and just to the party affected. It must give him notice of the charge or claim against him, and an opportunity to be heard respecting the justice of the order or judgment sought. The notice must be such that he may be advised from it of the nature of the claim against him, and of the relief sought from the court if the claim is sustained.'"

In *Cooke* v. *United States*, 267 U. S. 517 (1925; Op. by Mr. Chief Justice Taft), it is said:

(p. 536) "When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges * * *."

(p. 537) "Due process of law, therefore, in the prosecution of contempt, except that committed in open court, recognizes that the accused should be advised of the charges."

In *Windsor* v. *McVeigh*, 93 U. S. 274 (Op. by Mr. Justice Field), it was said, with reference to charges for the condemnation of property:

> (pp. 279-280) "* * * charges on which the condemnation is sought shall be specific, determinate and clear."

With it in mind that the Walsh Act is in derogation of the common law and must contain all provisions necessary for its complete operation, it is apparent that the foregoing cases defining the requirements of procedural notice, define at the same time the statutory notice which this special act must provide. Provision for a bare citation to appear, as we have seen, from the *Rosser* case, *supra*, is not notice of an offense. And, likewise, a bare citation to appear and defend against an unspecified contempt cannot be construed into a "specific, determinate and clear" charge against seized property.

Appellee criticizes the *Rosser* case, *supra*, on the ground that the Bankrupt Act was not held unconstitutional (A. B., p. 124). Reference to the case will show that Rosser did not attack the constitutionality of the Bankrupt Act. He did not attack the section under which the citation to him was authorized any more than we make specific attack on that part of the Walsh Act. We do not quarrel with the provision requiring a citation to appear; *our point is that the Act does not require notice in addition to the citation to appear.*

Appellee comments on *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, and concludes:

> (A. B., p. 125) "* * * If the Florida statute had provided for a *hearing after notice of the claim* at which the stockholder could show cause why judgment should not be rendered against him, the statute would not have been open to the objection that was sustained."

We are in precise agreement on the interpretation of this case. The Walsh Act does not provide for "notice of the claim".

The necessity for mandatory requirement of notice in special statutes was also emphasized in *Wuchter* v. *Pizzutti*, 276 U. S. 13.

Appellee argues that:

> (p. 125) "When an act of Congress specifies that a particular thing shall be done, such as an order to show cause why a defaulting witness shall not be adjudged in contempt, the Congress need not specify the details of the order. It is entitled to assume that the order will contain all the particulars essential to comply with the Constitution and other laws not inconsistent with the statute."

This might have more force had appellee's practical construction of the Act's requirements been in accord with the principle. As will be observed from the orders to show cause above excerpted, appellee did not consider the Act as requiring the specification of "details" or the "particulars essential to comply with the Constitution".

Moreover, as has been stated, the Act is special, is in derogation of the common law and must contain within itself those provisions necessary for its complete operation. "Under the assumption of a special power, it cannot be made general by any supposed necessity beyond the provisions of the Act". *Boswell's Lessee* v. *Otis*, 9 How. 336, 349; *Galpin* v. *Page*, 18 Wall. 350, 367, 370, 371, 372.

Appellee argues that a citizen is constructively charged with notice and knowledge of the statutes and laws of the land, and, therefore, is constructively charged with knowledge that a subpoena general in form is in fact a special subpoena under a special act (A. B., p. 127). We submit this is patently fallacious. When the special Act fails to provide for identifying itself with subpoenas issued by its authority, it fails to require the essential notice that special and not general law is in operation. General subpoenas, served extra-territorially, can only be given their face value. They are void.

REPLY D

Search and Seizure Authorized by Act Violates the Fourth Amendment.

We have replied to appellee's major contentions (see our first Reply Brief, pp. 35, 38). Appellee adds:

> (p. 131) "The Fourth Amendment *must* be interpreted in conjunction with the clause in the Fifth Amendment that no person shall be compelled in any criminal case to be a witness against himself." (Our italics).

The decisions of this court, however, establish that all searches and seizures, whether or not for incriminating purposes that "invade the sanctity of a man's home and the privacies of life", that invade "his indefeasible right of personal security, personal liberty and private property where that right has never been forfeited by his conviction of some public offense", and "whether accused of crime or not", violate the protection of the Fourth Amendment. *Boyd* v. *United States,* 116 U. S. 616; *Weeks* v. *United States,* 232 U. S. 383; *Cooley's Constitutional Limitations* (8th Ed.) Vol. I, pp. 610-636.

Appellee's point is met by the language of this court in *Go-Bart Imp. Co.* v. *United States,* 282 U. S. 344:

> (p. 357) "It (first clause of the Fourth Amendment) *is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders, as well as the innocent,* and unquestionably extends to the premises where the search was made and the papers taken. *Gouled* v. *United States,* 255 U. S. 298, 307. The second clause declares: 'and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. This prevents the issue of warrants on loose, vague, or doubtful bases of fact. *It empha-*

sizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty, they are denounced in the constitutions or statutes of every state of the union. *Agnello* v. *United States,* 269 U. S. 20, 33. The need of protection against them is attested alike by history and present conditions. *The amendment is to be liberally construed,* and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. *Boyd* v. *United States,* 116 U. S. 616, 623. *Weeks* v. *United States, supra,* 389-92. *There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances.*" (Our parenthesis and italics.)

Since, however, incriminating searches and seizures have met such uniform and spirited condemnation as violating the protection afforded the citizen by both the *Fourth* and *Fifth amendments,* it is interesting to compare the injury to a defendant in such cases with the injury to a defendant under the Act in question:

(a) In both, the search and seizure may cause invasion of the sanctity of defendant's home, his person, the privacies of his life, his private property, papers and effects, which because he has not been convicted of some public offense, have not been forfeited.

(b) In both cases the motivating impulse of the search and seizure *is to convict the defendant.*

(c) In both cases the defendant is presumed to be innocent.

(d) Both cases are actions *in personam;* neither case involves property disputes; there are no questions as to "offending property", or money claims.

(e) The incriminating seizure may result in conviction; the seizure under the Act in question may also re-

sult in conviction, because without the seizure there could be no trial of the offense.

(f) The incriminating seizure has a closely confined and connected relationship with the object to be attained —evidence; but the seizure under the Act may be *unlimited* and cannot possibly have relationship with the presumption of innocence prevailing at the time it is made, or with the possible fine, which may never be adjudged and which at the time of the seizure could not possibly be determined.

Appellee closes its argument with a broad hint of outlawry which violates the rudimentary conception of the fundamental rights of the citizen. *Hovey* v. *Elliott*, 167 U. S. 409, 444 (A. B., p. 132).

Even under ancient English common law in cases of felony, the property of the defendant could not be forfeited to the Crown until after conviction. This is stated in *The Three Friends*, 166 U. S. 1 (1896; Op. by Mr. Chief Justice Fuller).

> (pp. 50-51) (Quoting from the opinion of Justice Story in *The Palmyra*, 12 Wheat. 1, 14) "It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the Crown. The forfeiture did not, strictly speaking, attach *in rem;* but it was a part of at least a consequence, of the judgment of conviction. *It is plain from this statement, that no right to the goods and chattels of the felon could be acquired by the Crown by the mere commission of the offense, but the right attached only by the conviction of the offender. The necessary result was, that in every case where the Crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of the judgment of conviction. In the contemplation of the common law, the offender's right was not divested until the conviction.* But this doctrine never was applied to seizures and forfeitures, created by statute, *in rem*, cognizable on *the revenue side of the Exchequer. The thing is here primarily*

considered as the offender, or rather the offense is attached primarily to the thing; and this whether the offence be *malum prohibitum* or *malum in se.* The same principle applies to proceedings *in rem,* on seizures in the Admiralty. Many cases exist, where the forfeiture for acts done attaches solely *in rem,* and there is no accompanying penalty *in personam.* Many cases exist where there is both a forfeiture *in rem* and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. *But the practice has been and so this court understands the law to be, that the proceeding in rem stands independent of, and wholly unaffected by any criminal proceeding in personam.* And see *The Malek Adhel,* 2 How. 210; *United States* v. *The Little Charles,* 1 Brock, 347." (Our italics.)

REPLY E

Act Violates Due Process Because it Authorizes Trial and Judgment in the entire absence of Defendant without his Consent.

Appellee suggests that the holding of this Court in *Ex parte Terry,* 128 U. S. 289, contemplated the necessity of notice prior to trial rather than personal jurisdiction over the defendant at the trial, as contended by appellant. Appellee does not demonstrate its opinion. The case will speak for itself. The stated question in the *Terry* case was:

(128 U. S., p. 311) "Whether the petitioner's retirement from the Court Room into another room of the same building, after he had been guilty of misbehavior in the presence of the Court, and had violently obstructed the execution of its lawful order, defeated the jurisdiction which it possessed, at the moment the contempt was committed, to order his immediate imprisonment, without

other proof than that supplied by its actual knowledge and view of the facts, and without examination or trial in any form?"

In answering this question in the affirmative, this Court said:

(pp. 311-312) "If, in order to avoid punishment, he had absconded or fled from the building, immediately after his conflict with the marshal, the court, in its discretion, and in the circumstances rendered proper, could have ordered process for his arrest and given him an opportunity, before sending him to jail, to answer the charge of having committed a contempt. But in such a case the failure to order his arrest, and to give him such opportunity of defence would not affect its power to inflict instant punishment. Jurisdiction to *inflict such punishment having attached while he was in the presence of the court*, it would not have been defeated or lost by his flight and voluntary absence." (Our italics).

And further (p. 314):

"Nor, in our judgment, is it an accurate characterization of the present case to say that the petitioner's offense was committed 'at a time preceding, and separated from, the commencement of his prosecution'. His misbehavior in the presence of the court, his voluntary departure from the court room without apology for the indignity he put upon the court, his going a few steps, and under the circumstances detailed by him, into the marshal's room in the same building where the court was held, and the making of the order of the commitment, took place, substantially, on the same occasion, and constituted, in legal effect, one continuous complete transaction, occurring on the same day, and at the same session of the court. *The jurisdiction, therefore, of the Circuit Court to enter an order for the offender's arrest and imprisonment was as full and complete as when he was in the court room in the immediate presence of the judges.*" (Our italics).

We submit it is perfectly apparent that the opinion did not concern itself primarily with the necessity of notice; that it did concern itself primarily with the necessity of personal jurisdiction over the defendant.

Merchants Stock & Grain Co. v. *Board of Trade,* 201 Fed. 20 (A. B., pp. 131-134), and the authorities therein referred to, viz., *Ex parte Terry, supra,* 128 U. S. 189; and *Middlebrook* v. *State,* 43 Conn. 257, were all cases involving contempt committed in the face of the Court, in which the defendant was initially present and, therefore, was "in the presence and constructively, at least, in the power of the Court" when sentence was pronounced.

Appellee says that if this Court in *Cooke* v. *United States,* 267 U. S. 517, had intended that the defendant in contempt cases should be personally present, at least at some stage of his trial, it would have said that he should "be brought and held in custody as a criminal" (A. B., p. 135).

The fact is, this Court emphasized that the contemnor "must be brought in". In the *Cooke* case, the first step by the District Court was the issuance eleven days after the alleged contumacy (Case, p. 521) of "an order of attachment and the arrest of the petitioner". The Opinion states:

> "It is not shown that the writ of attachment contained a copy of the order of the court, and we are not advised that the petitioner had an exact idea of the purport of the charges until the order was read. In such a case, and after so long a delay, it would seem to have been proper practice, as laid down by Blackstone, 4 Commentaries, 286, to issue a rule to show cause. * * * *Without any ground shown for supposing that a rule would not have brought in the alleged contemnors, it was harsh under the circumstances to order the arrest.*" (Our italics).

REPLY F

Denial to accused in criminal prosecutions of right to compulsory process.

The first division of appellee's argument is summarized as follows:

> (A. B., p. 139) "We do not deny the appellant's right to challenge the constitutionality of those features of the Walsh Act as have directly affected him, but we contend he has no right to question such features as only could affect Sinclair and Fall or that would not operate to appellant's prejudice. Just as in the Blair & Watson cases, the appellant lacks the capacity to raise this point because he is attempting to assert an alleged defect that only concerned, as a primary right, the defendants in the criminal trial."

Our complete reply to this is:

Section 2 of the Act is unconstitutional because it deprives the accused of his constitutional right to compulsory process, and at the same time impairs appellant's proper liberties as a citizen and starts in motion procedure which denies and impairs his lawful property rights. The section, therefore, directly and adversely affects appellant, not in the precise manner in which the accused in the criminal action is unconstitutionally injured, but by the operation of the precise section of the Act.

As to the necessity for equal compulsory process (A. B., p. 140): In *In re Dillon,* 7 Fed. Cases, p. 710, the Court said:

> (p. 712) "By the ancient rules of the common law, the party accused in capital cases has no right to exculpate himself by the testimony of any witnesses. The injustice of so unreasonable and oppressive a rule induced the courts to relax it, and the practice was gradually introduced of examining

witnesses for the accused, but not upon oath. Sir Edward Coke denounces this practice as tyrannical and unjust, and contended that in criminal cases the accused was entitled to have witnesses sworn for him. It is now in England, by statutes comparatively recent, provided that the accused shall in all cases have the right of having witnesses sworn for him as well as against him. I am not aware that he even yet, in that country, possesses the right to compulsory process to obtain their attendance. The analogous right of the accused to have the assistance of counsel, does not to this day, or did not very recently, exist in England in any criminal cases except indictments for treason. Such was the state of the common law when the provisions giving the accused the right to compulsory process to secure the attendance of his witnesses and the right to have the assistance of counsel, were incorporated into the constitution. They were obviously intended to abrogate the harsh and tyrannical rules of the common law which have been referred to, *and to place the accused in a position to make his defense and establish his innocence, by giving him rights in all respects similar and equal to those possessed by the government for establishing his guilt. If, then, the accused, by virtue of these provisions, enjoys rights equal to those of the prosecution, and stands, with respect to witnesses, on the same footing, with the government, it would seem that the object of the constitution is accomplished.* Such seems to have been the construction given by congress to this provision of the constitution. By section 29 of the crimes act of April 30, 1790, it is provided, 'that every person accused or indicted under that act shall have the like process of the court where he shall be tried, to compel his witnesses to appear at his trial as is usually granted to compel witnesses to appear on the prosecution against them.' The fact that this act passed by the first congress assembled under the constitution, most of whose members had been members of the convention which framed that instrument, gives to this legislative construction a more than ordinary importance."

We can add nothing to the foregoing, and appellee demonstrates nothing wrong with it.

Appellee argues (A. B., pp. 142-143) that because the requirement for *like process* in the *First Crimes Act* of April 30, 1790 (1 Stat. 118; R. S. Sec. 1034; U. S. C. A. tit. 18, Sec. 563) occurred in a section dealing with treason and capital offenses, Congress did not consider *like process* to be necessary in other kinds of cases. But it would have been entirely gratuitous and most peculiar had Congress expressly prescribed *like process* for all cases within the whole field of criminal law while engaged in drafting a section dealing alone with treason and capital offenses. We think it is clear that the court in the *Dillon* case, *supra,* went on the theory that the members of the First Congress were simply applying to the specific matter before them (treason and capital cases) that which comported with their general conception of what a defendant ought to have in the way of compulsory process in the light of what he did not have under the then existing English common law. That conception was crystallized in the Sixth Amendment which at the time of the enactment of the *First Crimes Act* was in the process of ratification, completed December 15, 1791.

It is said that there are a number of respects in which a person accused of crime has a lesser right to compulsory process than is accorded to the Government (A. B., pp. 143-146), for the reasons that an indigent criminal defendant is given a limited right to process at the Government's expense; that the Government's rights are superior in the matter of the issuance of a recognizance; that the accused can ask for no more than ordinary diligence on the part of the serving officer; that the court has discretion in the matter of granting continuances because of the absence of witnesses; that it is in the discretion of the court whether it will grant a request of an accused for the appearance of a witness confined in

jail or state prison, and that the issuance of a subpoena *duces tecum* is in the discretion of the court.

This is all answered by that which is obvious, to wit, that the Constitution does not guarantee compulsory process *at the Government's expense;* does not guarantee the accused the right to put his witness in jail or in the alternative to compel the posting of a recognizance; does not guarantee extraordinary diligence on the part of the serving officer; does not guarantee continuances. These are all administrative matters. The Government also may suffer from the stupidity or procrastination of serving officers, from the failure to secure requested continuances, or from a court's decision not to allow witnesses to be brought from jail or not to allow subpoenas *duces tecum.*

As to appellee's proposition that under the Act the accused in the criminal case has substantially equal process: We met most of this in our first reply brief (pp. 42-44).

Appellee introduces the suggestion that Federal courts have uniformly issued commissions *dedimus potestatem* to take depositions of absent witnesses in criminal cases under *Section 866, Revised Statutes of the United States.*

Three cases are cited: *United States* v. *Wilder,* 14 Fed. 393; *United States* v. *Cameron,* 15 Fed. 794, and *United States* v. *Sinclair and Fall,* No. 43324 in the Supreme Court of the District of Columbia. In the latter case (*United States* v. *Sinclair and Fall, supra*), the Government and the defendant agreed on depositions, and hence there was no question before the court. In both the *Wilder* and *Cameron* cases, *supra,* the Government resisted the defendant's request for depositions. In the *Wilder* case, *supra,* the Court said:

> (14 Fed. p. 393) "*The application is resisted by the district attorney on the grounds that it is unprecedented, and without authority,* to take the evidence of witnesses in criminal cases by com-

mission, and that the evidence, if taken, would be inadmissible on the trial.

* * * * * * * * *

"Taking evidence in the manner asked in this case may be and *probably is unprecedented in the United States courts in criminal cases,* but I am informed is permitted in state courts of Georgia, and is allowed by statute in other states. * * * *When the evidence is taken* and the case comes on for trial, its scope, force, and effect can be seen, *and its admissibility to go before the jury determined,* and if the defendant shall be deprived of his testimony before the jury because the law will not allow its consideration, and the defendant shall be convicted, the testimony will certainly be considered by the judge who shall be called upon to exercise the large discretion given by the statute in imposing sentence in the case." (Our italics).

In the *Cameron* case, *supra,* counsel for the government presented (15 Fed. p. 794) a "learned and elaborate argument * * * to establish the proposition that this statute (R. S. Sec. 866) *applies only to civil causes." The court limited depositions in criminal cases to those states where their use for that purpose was permitted by "common usage".* Appellee does not inform us how many states of the Union sanction the use of depositions in criminal cases.

Whatever is attempted to be made from the deposition argument is answered by the fact that the Walsh Act does not authorize the issuance of depositions for the benefit of either the accused or the government. The method of securing testimony is limited to letters rogatory under *Section 1* and to the subpoena under *Section 2* (Act secs. 1 and 2).

Another new thought injected by appellee is:

(A. B., pp. 148-149) "The further argument of the appellant that letters rogatory are not compulsory process because the foreign country can-

not be compelled to execute them does not meet our answer that if the letters are recognized and executed, the accused has substantially equal process, *and if they are not so recognized, compulsory process for the witness abroad is available.*" (Our italics).

We answer with the terms of the Act. *Section 2*, which is the only part of the Act authorizing the issuance of subpoenas, confines itself entirely to subpoenas "desired by the attorney general or any assistant or district attorney acting under him." If it were the fact, which it is not, that the accused in a criminal case is entitled to letters rogatory under *Section 1* of the Act, such letters represent, therefore, the only process available to him, and we have already shown that letters rogatory are not equal compulsory process—are not compulsory process at all (Our first reply brief, pp. 42-44).

REPLY G

Arbitrary, unreasonable, capricious character of the Act.

Among the elements which we submit establish the arbitrary, capricious, unreasonable character of the Act, as pointed out by us in our earlier briefs (first brief, pp. 40-41; first reply brief, pp. 44-45) is the provision which makes the ownership of "non-offending" property a condition precedent to judgment of guilt of a criminal offense.

As to this appellee argues that the property is no more "non-offending" than is the property which is seized in "foreign attachment" cases. We shall try again to make the distinction clear.

The presumption of innocence inheres in the trial of an offense. It inheres in the trial of criminal contempt

cases. *Gompers* v. *Bucks Stove and Range Co.*, 221 U. S. 418; *Michaelson* v. *U. S.*, 262 U. S. 42. The money claim in connection with the trial of an offense cannot arise until after the presumption of innocence has ceased to exist, until after the evidence is in and guilt has been adjudged. The concurrent existence of a claim for a fine and the presumption of innocence which presumes that a fine will not be adjudged is, therefore, a self-evident impossibility. On the other hand, the claim of indebtedness (which cannot be reconciled with the presumption of innocence in the trial of a criminal offense), whether it sounds in contract, torts, inchoate matters, or otherwise, and whether stated or to be determined, inheres in, attaches to and has logical place at the trial of the issue of indebtedness in all so-called "foreign attachment" or *quasi in rem* cases.

Appellee denies that it is a fundamental right of a citizen to have his property and person protected by his Government while he deliberately refuses to perform his obligations of allegiance to the country. This merely assumes the correctness of appellee's entire case, as does also the later thought that appellant deliberately put himself in a position where he forfeited some of his fundamental rights as a citizen "not guaranteed by the Constitution" (A. B., p. 153). We add that it is difficult to conceive of "fundamental rights" of a citizen which are not guaranteed by the Constitution.

The reference to appellant having "flouted the Government" (A. B., p. 153) is rhetorical rather than factual. The record shows that resistance to the Act and the procedure under it which appellant considers to be unconstitutional, has been entirely respectful. This is illustrated by the fact that on the return day of the subpoenas in 200, counsel appeared specially for appellant and attempted to explain to the trial court why he was not there, that he did not "desire even to appear to flout or be disrespectful of the process of" that court. The explanation was not permitted (R. 200, pp. 10-11). It is further

illustrated by the earnest, serious character of the proceedings from the trial court to this court initiated and maintained by defendant to vindicate what he and his counsel believe are his constitutional rights.

PROCEDURAL POINTS.

Introductory Statement.

Appellee brings forward an excerpt from one of appellant's briefs in the trial court to the effect that the proceedings in 200 were "taken in exact pursuance of the Act." (A. R., p. 154).

This statement, more narrowly expressed than intended, was for the purpose of the motion to vacate, in order to strip the argument which we then made of everything other than constitutional questions. It is clearly apparent from the record that such was the purpose of the statement. That petitioner had no intention of making an admission in the further progress of these causes is abundantly evident from the vigor with which every step of the proceedings was challenged (R. 200, pp. 39-51, 52-58, 67-68, 72-85; R. 201, pp. 21-32, 35-42, 50-53, 56-81). Moreover, the procedural points being jurisdictional, they could be raised even on review. The court below does not mention appellee's suggestion.

Reply H-a—No proper showing for subpoenas.

Section 2 of the Act makes a "proper showing" the condition precedent to the issuance of the subpoena. We have made the point that the showings in these cases were nothing more than showings of a state of mind—a series of beliefs (R. 200, pp. 1-3; R. 201, pp. 1-2).

Reference to the record will show the complete correctness of this and we emphasize it now because counsel for appellee at the oral hearing said:

> (Stenographic transcript of oral argument before this court, pp. 29-30) "In the first place, counsel representing the Government filed a motion or petition with the court, in which, in substance they said *that they were informed* and believed, I am not using the exact language, that this witness had certain information that was material in the case * * *"

The allegation that counsel were "informed" does not appear in their showings to the trial court (R. 200, pp. 1-3; R. 201, pp. 1-3).

The argument that counsel could not show more than their "belief" for the reason alleged by them that the desired witness left the country upon the approach of clouds of danger, and that he had refused on letters rogatory issued in a previous civil case, to give more than his name, has no relevancy to the question of whether a "belief" can be a "proper showing".

There is nothing before this court except this unsupported statement that the desired witness "left the country upon the approach of clouds of danger". In view of this unfair gratuity, we take the liberty of saying that when appellant, on February 21, 1925, appeared before a judge of the Civil Tribunal of the First Instance of the Seine at Paris, France, he was first duly sworn and then declined to answer the questions included in the letters on the grounds that he had retired from business, did not intend to be drawn into the controversy, and had done nothing contrary to law, honor or morality directly or indirectly concerning the matter. In response to the inquiry of counsel for the Government, the French court stated that appellant was not required to answer. In this connection it may be interesting to note that the civil fraud action out of which the letters issued was commenced in March 1924; that in September 1924, coun-

sel for the Government, in connection with a motion for a continuance, declared themselves ready for trial and insisted upon trial on the date then set, to wit, October 7, 1924; that it was not until December 16, 1924 that counsel for the Government requested a continuance on the ground that defendant and others had "information and could give testimony *vital to the issue*" (Record No. 7188, filed September 28, 1925, in C. C. of A. 8th Circuit, in *United States* v. *Mammoth Oil Co.*, pp. 122, 200, 201, 546, 547). It is not alleged that appellant's testimony was before any Grand Jury or representative of the Government.

Appellee resorts to the dubious expedient of suggesting that the court "may have inquired further and orally of counsel concerning the foundation for their belief." If so, it was not a "proper showing" and if so there is nothing of the kind in the record.

Appellee runs amuck in this point with unfair innuendo. The statement—"surely, the appellant does not contend that he was entitled to notice of the application to subpoena him so that he could prepared himself to dodge service", is a flagrant example. (A. B., p. 156). How utterly unwarranted, is shown by the record. Consul Orr's return to one of the subpoenas issued in 200 shows that the service was made *"at the usual residence of the witness, rooms 501-502-503, Hotel Plaze Atheneé, 25 Rue Montaigue, Paris, France.* * * *"* The returns on all subsequent subpoenas and orders to show cause show that the services were made on appellant at Paris, France (R. 200, pp. 9-10, 12-13; R. 201, pp. 5, 14).

Appellee cites cases which it claims support its statement that one who fails to obey a subpoena or an order to show cause or other order of court "valid on its face and issued pursuant to jurisdiction of the court of the parties and subject matter" cannot question the sufficiency or regularity of the proceedings leading up thereto, or the form or sufficiency of the showing for the issuance of the subpoena or order. (A. B., pp. 156-157).

None of the subpoenas or orders served on appellant was "valid on its face." Not one of the subpoenas identified itself with the special Act. They were all in the form of general law subpoenas. Carrying that appearance on their faces and served extra-territorially they were invalid and might be disregarded. Likewise, the orders to show cause did not identify their unidentified contempts with the special Act in question. The only reference to the Walsh Act in any paper served upon appellant was in the order to show cause in 200 and there the reference was to a direction for the order's publication in the Washington Evening Star (R. 200, pp. 7, 9, 11-12; R. 201, pp. 4, 11-12).

It is not important here whether one who fails to obey the process of a court "issued pursuant to jurisdiction of the court of the parties and of the subject matter" may or may not question the sufficiency or regularity of antecedent proceedings. In the cases at bar the special Act in question provided that there must be a "proper showing" for the issuance of its subpoenas. Being obviously for the protection of the citizen, the provision was mandatory and jurisdictional.

In *French* v. *Edwards*, 13 Wall. 506, this court said:

> (p. 511) "There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. *But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be in-*

juriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise." (Our italics).

Reply H-b—Subpoenas did not carry notice of the Act.

The subpoenas did not carry notice of the Act (R. 200, pp. 7, 9; R. 201, p. 8). Appellee argues that appellant knew about the Act and that he had actual knowledge that the subpoenas issued under it. If appellant had been the author of the Act he could not have known that the subpoenas served upon him were under the Act's authority. Appellant and his counsel might have engaged in limitless conversation over the Walsh Act and its unconstitutionality and over the subpoenas in 200—the only subpoenas which had been served at the time of the conference between Mr. Battle and appellant (R. 200, p. 77; R. 201, p. 70)—without the slightest possibility of having been able to identify those subpoenas as having issued under that Act.

The Act is special, is in derogation of the common law and the burden of showing strict compliance is upon the Government. The records before this court show that the Government relies on general law subpoenas and not on subpoenas under the special Act, and therefore, because served extra-territorially, relies on invalid subpoenas (R. 200, pp. 7, 9; R. 201, p. 8).

And if appellee had *actual knowledge* of the fact that the subpoenas issued under the Walsh Act *as distinguished from notice conveyed by the subpoenas themselves or other official notice required by the Act,* it would not supply the omission.

In *Wuchter* v. *Pizzutti,* 276 U. S. 13, this court said:

(p. 24) "But it is said that the defendant here had actual notice by service out of New Jersey in

Pennsylvania. He did not, however, appear in the cause and such notice was not required by the statute. Not having been directed by the statute, it cannot, therefore, supply constitutional validity to the statute or to the service under it." *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 424, 425; *Louisville and Nashville R. R. Co.* v. *Stockyards Co.,* 212 U. S. 132, 144; *Central of Georgia Ry. Co.* v. *Wright,* 207 U. S. 127, 138; *Security Trust Co.* v. *Lexington,* 203 U. S. 323, 333; *Roller* v. *Holly,* 176 U. S. 398, 409; *Stuart* v. *Palmer,* 74 N. Y. 183, 188; *Berryhill* v. *Sepp,* 106 Minn. 458.

Reply H-c—Lack of notice to the petitioner in the case at bar of the facts constituting the offense and the claims against his property.

The only notice which appellant received of his alleged offenses and of any alleged claims against his seized property consisted of the unsupported orders to show cause which we have already excerpted in connection with our constitutional notice point (pp. 49-51, *supra*).

Those citations, as has been pointed out, do not specify or identify the offense or make any claim against appellant's seized property. It is said, however, that if appellant was in doubt he might have found the papers in the records of the court, and that counsel do not deny receipt as a matter of courtesy from the solicitors for the Government of the petition and other papers; that appellant could not have appeared specially without knowing the charges he was denying (A. B., p. 163).

This is all disposed of by the rule on several occasions repeated by this court—that notice under special acts must be officially conveyed and mandatorily required. *Wuchter* v. *Pizzutti,* 276 U. S. 13, 24, and cases therein cited.

The statement is made that, "counsel for appellant received copies of all pleadings" (A. B., p. 163). If by

this appellee means that such pleadings were received officially, the statement is utterly incorrect and very misleading. There is nothing in the record to support it.

Reply H-d—Abandonment of levy and seizure in 200.

We have already answered everything stated by appellee (our first reply brief, pp. 50-51), except the new theory that the attachment is not jurisdictional; that the service on appellant of the orders to show cause validated the punitive procedures (A. B., p. 165).

We submit we have established that the attachment is jurisdictional (p. 43, *supra*). Without repeating all of the reasons we simply invite attention to the fact that under the Act no possible authority can be deduced for publishing or serving the order to show cause unless the Marshal has first made the levy (Act, sec. 6).

Reply H-e—Petitioner not subpoenaed to attend a trial on April 9, 1928 (Case 201).

Appellee's entire argument to support appellant's conviction of criminal contempt for failing to appear on a date not commanded comes to this: the subpoenas contained "not depart" clauses; that the "not depart" clauses were provisions of general law subpoenas; that general law subpoenas may be used on the principle "too well known to require the citation of authority that acts of unlimited scope, such as *R. S., Section 877, supra,* are enforced in every respect not inconsistent with acts of limited applicability", and that "the law is well settled that a witness is required to attend court from time to time and term to term until the case is tried or until he is properly excused" (A. B., pp. 167-168).

This court has spoken on these matters:—

Galpin v. Page, 18 Wall. 350 (1874). Opinion by Mr. Justice Field.

"(p. 367) The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process, *and also over proceedings which are in accordance with the course of the common law.*"

"(p. 370) 'However high the authority to whom a special statutory power is delegated,' says *Mr. Justice Coleridge,* of the Queen's Bench, 'we must take care that in the exercise of it the facts giving jurisdiction plainly appear, and that the terms of the statute are complied with. The rule applies equally to an order of the Lord Chancellor as to any order of Petty Sessions.' *Christie* v. *Unwin,* 3 Per. & Dav., 208.

(p. 371) 'A court of general jurisdiction,' says the Supreme Court of New Hampshire, 'may have special and summary powers, wholly derived from statutes, not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction. In such cases, its decisions must be regarded and treated like those of courts of limited and special jurisdiction. *The jurisdiction in such cases, both as to the subject-matter of the judgment, and as to the persons to be affected by it, must appear by the record; and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it. Morse* v. *Presby,* 5 Fost., 302.

(p. 371) The qualification here made that the special powers conferred are not exercised according to the course of the common law, is important. When the special powers conferred are brought into action according to the course of that law, that is, in the usual form of common law and chancery proceedings, by regular process and personal service, where a personal judgment or decree is asked, or by seizure or attachment of the property where a judgment *in rem* is sought, the same presumption

of jurisdiction will usually attend the judgments of the Court as in cases falling within its general powers. Such is the purport of the language and decision of this court in *Harvey v. Tyler*, 2 Wall. 332 (69 U. S., XVII, 871). *But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record.*

(p. 372) *The extent of the special jurisdiction and the conditions of its exercise over subjects of persons necessarily depend upon the terms in which the jurisdiction is granted, and not upon the rank of the court upon which it is conferred. Such jurisdiction is not, therefore, the less to be strictly pursued because the same court may possess over other subjects or other persons a more extended and general jurisdiction.*" (Our italics).

Boswell's Lessee v. *Otis*, 9 Howard, 336.

(p. 350) "No principle is more vital to the administration of justice than that no man shall be condemned in his person or property without notice, and an opportunity to make his defence. And every departure from this fundamental rule, by a proceeding in rem, in which a publication of notice is substituted for a service on the party, should be subjected to a strict legal scrutiny. Jurisdiction is not to be assumed and exercised in such cases upon the general ground that the subject-matter of the suit is within the power of the court. This would dispense with the forms of the law prescribed by the legislature for the security of absent parties. *The inquiry should be, have the requisites of the statute been complied with, so as to subject the property in controversy to the judgment of the court, and is such judgment limited to the property named in the bill. If this*

cannot be answered in the affirmative, the proceedings of the court beyond their jurisdiction are void." (Our italics).

Examining the Act in the light of the foregoing, we find no reference to R. S. Sec. 877; no reference to term subpoenas; no reference to general attendance subpoenas; no authority to include the "not depart" clause.

It follows that appellee's theory for construing appellant into contempt on April 9 is without the support of the special Act in question, and, therefore, cannot be accepted.

Respectfully submitted,

George Gordon Battle,
Karl C. Schuyler,
and
Eugene D. Millikin,
Frederick De C. Faust,
Charles F. Wilson,
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In the Supreme Court of the United States

OCTOBER TERM 1931.

Nos. 200-201.

HARRY M. BLACKMER,
Petitioner,

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BRIEF IN OPPOSITION TO THE PETITION FOR WRITS OF CERTIORARI
To the Court of Appeals of the District of Columbia.

LEO A. ROVER,
United States Attorney,
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To the Court of Appeals of the District of Columbia.

To the Honorable, Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The United States, the respondent herein, submits this brief in opposition to the petitions for writs of certiorari.

Opinion of the Supreme Court of the District of Columbia Printed in Record, No. 5131, at pp. 20-33, 58-65; in Record, No. 5132, at pp. 42-49.

Opinion of the Court of Appeals of the District of Columbia Printed in Vol. 49 Fed. (2d) 523.

STATEMENT OF THE CASE.

The petitioner, a citizen of the United States, was tried in the Supreme Court of the District of Columbia in two cases for contempt, No. 16 and No. 18, in failing to respond to subpoenas issued out of said court and directed to

consuls of the United States then in France to be served upon the petitioner, Harry M. Blackmer, then residing in Paris. The subpoenas were issued under the Act of July 3, 1926, commonly known as the Walsh Act. All proceedings herein were taken under the said Act. The late Mr. Justice Siddons tried the cases and sentenced Blackmer to pay a fine of $30,000 and costs in each case.

An appeal was taken by him to the Court of Appeals of the District of Columbia. The cases in said court are designated respectively as No. 5131 and No. 5132.

On April 6, 1931, the Court of Appeals of the District of Columbia, Mr. Justice Robb delivering the opinion, affirmed the judgments and sentences of the trial court.

Case No. 43,324, United States v. Harry F. Sinclair and Albert B. Fall, indictment for conspiracy to defraud, was assigned for trial on October 17, 1927.

PROCEDURE IN NO. 5131.

On May 13, 1927, counsel, representing the government, filed their petition, signed by them and sworn to by Owen J. Roberts, praying for the issuance of subpoenas under the Act of July 3, 1926, for Harry M. Blackmer and another to attend the trial in Washington. The United States Attorney, Honorable Peyton Gordon, and Special Assistants to the Attorney General, Owen J. Roberts and Atlee Pomerene, set out in said petition that the attendance of said witnesses was vital and important to the United States; that they had knowledge and information with regard to certain important facts which the United States desired to prove in said case and that their testimony as to said facts would be material in connection with the establishment, not only of the conspiracy charge between the said defendants, but in connection with certain overt acts done in pursuance thereof, and particularly they set out that said witnesses could testify to facts concerning

the persons, who, in the latter part of the year 1921, were the stockholders in the Continental Trading Company Limited, and with regard to the distribution by that corporation to its stockholders of certain 3½% Liberty Bonds, which were subsequently delivered by the defendant, Harry F. Sinclair, to his co-defendant, Albert B. Fall. (R. 5131, pp. 1-3)

The court issued an order granting said subpoenas, addressed to certain consuls of the United States in France, to be served upon said witnesses for their appearance in Criminal Court No. 2 in Washington on the 17th day of October 1927, and requiring that the said witnesses should each be tendered Five Hundred Dollars ($500.00) for necessary expenses in traveling to Washington and return and attending the court. Said subpoenas were in the usual form, from "The President of the United States to H. M. Blackmer," commanding him to attend said court on October 17, 1927, at 10 o'clock A. M., to testify on behalf of the United States and "not depart the court without leave of the court or District Attorney." (R. 5131, p. 7)

Two subpoenas were served, one by George Orr, consul of the United States at Paris, directing him to serve the subpoena and make return thereof to the court. His return (R. 5131, p. 8) shows that the witness Blackmer was served personally, on the 27th day of May 1927, at his usual place of residence, and the original of said subpoena left in his hands, and the said consul tendered him Five Hundred Dollars ($500.00) for traveling expenses, which he refused. On June 7, 1927, a similar subpoena was served by Raymond Davis, consul of the United States at Paris, upon Blackmer personally by reading the same to him and leaving a duplicate copy with him at Paris. He also tendered to the said Blackmer Five Hundred Dollars ($500.00) in currency, which tender Blackmer refused. (R. 5131, pp. 9-10)

Blackmer failed to appear in court at the time required. His name was called by the Clerk. Counsel representing him appeared for the purpose of explaining to the court why Blackmer was not present. The record shows that he was not in court in response to the subpoena and would not be. (R. 5131, p. 11)

On November 4, 1927, counsel for the government filed their petition for a rule in contempt alleging in substance that on May 13, 1927, they presented their petition to the trial judge for a subpoena for H. M. Blackmer, a citizen of the United States, temporarily sojourning in France, to appear in court as a witness on October 17, 1927; that the said order was issued, commanding him to appear at 10 o'clock, on said day, in court at Washington, to testify on behalf of the United States in Criminal Case No. 43,324, and "not depart the court without leave of the court or District Attorney."

The court further ordered that the consul should tender Five Hundred Dollars ($500.00) for his necessary expenses in traveling to and from the place in which the court sat and his expenses in attendance thereat; that on the 27th of May, 1927, the consul of the United States at Paris, France, served a subpoena on the said Blackmer by exhibiting the same to him and delivering to him personally a copy thereof and tendering to him the sum of Five Hundred Dollars ($500.00). On the 7th day of June 1927 a similar subpoena was served upon him personally by another consul of the United States by exhibiting and reading same to him, leaving a copy with him and tendering him Five Hundred Dollars ($500.00) and due return of said subpoena was made to the Clerk of the trial court and at the time stated, the witness was called by the Clerk in open court. He did not respond and neglected and refused to appear. Blackmer's attorneys appeared and at his request stated that the witness was not present and would not appear.

On November 16, 1927, on the petition filed by the same attorneys, representing the government, the court issued an order directing Blackmer to appear on Friday, January 6, 1928, to show cause why he should not be adjudged guilty of contempt and punished accordingly; directing that his property within the United States, in the amount of $100,000 should be seized by the United States marshal "to satisfy any judgment that may be rendered against him in this proceeding." The marshal was also directed, upon making such levy, to forward to the consuls of the United States in France a copy of said order with the request that it be served personally upon the said Blackmer and the marshal was ordered to publish said order in The Washington Evening Star, a newspaper of general circulation in the District of Columbia, once a week for six weeks. The marshal's return showed that the $100,000, the property of Blackmer, was levied upon and seized. The United States consul at Paris made due return that a true copy of said order was served upon Blackmer personally. (R. 5131, pp. 12-13) The publication was made as ordered. (R. 5131, p. 14)

The case of United States vs. Sinclair and Fall proceeded to trial, but a mistrial was declared.

PROCEDURE IN NO. 5132.

The Sinclair-Fall case was reassigned for trial on April 2, 1928. (R. 5132, pp. 1-3)

On January 9, 1928, government counsel petitioned the court for an order to issue subpoenas for Blackmer and another citizen of the United States then in France. Said petition was signed by counsel and sworn to by Atlee Pomerene. They represented that the attendance of said witnesses was vital and important to the United States because it was believed that they had knowledge and information with regard to certain important facts, which the

United States desired to prove, and that their testimony as to said facts would be material in connection with the establishment of the conspiracy charge between the defendants in the Sinclair-Fall case, and in connection with the proof of overt acts done by them in the pursuance of said conspiracy.

Petitioner further believed and therefore averred that they could testify to facts concerning the persons who in the latter part of the years 1921 and 1922 were stockholders of the Continental Trading Company Limited, and with regard to the distribution by said company to its stockholders of certain 3½% Liberty Loan Bonds as dividends, which they believed and averred were subsequently delivered by the defendant, Harry F. Sinclair, to the other defendant, Albert B. Fall. (R. 5132, p. 2)

On the same day the court ordered the subpoenas to be issued, as prayed for, addressed to the consuls of the United States in France, commanding the said witnesses to appear in Criminal Court No. 2 on the 2nd day of April 1928, and directed that each of them be tendered Five Hundred Dollars ($500.00) for necessary expenses in traveling to and from Washington and for attendance at court. Said subpoenas were in the traditional form, addressed by the President of the United States to the witnesses, directing their appearance on April 2, 1928, at 10 o'clock, to testify on behalf of the United States and "not depart the court without leave of the court or District Attorney." (R. 5132, p. 4)

The subpoena for Blackmer was served by George Orr, Consul of the United States in France, and he made return that he had personally served the said Blackmer by exhibiting said subpoena personally to him, reading same to him and leaving a duplicate copy with him at Paris; also that he had, pursuant to the order of the court, tendered said Blackmer Five Hundred Dollars ($500.00) in currency, which tender Blackmer refused. (R. 5132, p. 5)

On July 6, 1928 Government Counsel filed their petition in the Supreme Court in the District of Columbia, representing that a subpoena was issued by the court for the said Harry M. Blackmer, a citizen of the United States, to appear in the Supreme Court of the District, as hereinbefore stated, on April 2, 1928; that a subpoena was issued and served accordingly on January 12, 1928, pursuant to said Act, which directed him to appear and "not depart the court without leave of the court or District Attorney"; that a tender of Five Hundred Dollars ($500.00) was made to the said Blackmer for necessary expenses; that due return was made by the said consul of said subpoena and of the tender of money (R. 5132, pp. 6-7); that the trial of said case was continued until Wednesday, April 4, 1928; that on April 3, 1928 the court continued the case until Monday, April 9, 1928; that counsel requested the court to have the Clerk call the said Blackmer as a witness; that the court so instructed the Clerk; that the Clerk called "Harry M. Blackmer" and the said Blackmer did not respond to said call and neglected and refused to appear.

Counsel asked for an order under Section 4 of said Act directing the witness to appear upon a day and time to be designated in said order "to show cause why he should not be adjudged guilty of contempt and punished accordingly." They further asked that the court issue an order directing the marshal to seize the property of the said Blackmer in the United States of the amount and value of $100,000 or such other value and amount as the court might think proper to satisfy any judgment that might be rendered against the said Blackmer in said proceeding. That the marshal made such levy and seizure, forwarded a copy of the order to United States Consul Orr to be served personally upon said Blackmer. He caused the said order to be published in a newspaper of general circulation in the District of Columbia. An order was issued thereon, on July 6, 1928. (R. 5132, pp. 9-10)

On December 26, 1928, an alias order was issued on said petition citing said Blackmer to appear before the Supreme Court of the District of Columbia on the 25th day of February, 1929, at 10 o'clock A. M. and show cause why he, the said Blackmer, should not be adjudged guilty of contempt of court in neglecting, failing and refusing to obey the subpoena heretofore issued by said court and served upon him to appear as a witness in the case of United States vs. Sinclair and Fall, the circumstances of which are very fully set out in the motion (or petition) of the plaintiff filed herein and why the said H. M. Blackmer should not be fined and punished therefor according to law. The marshal of the district was further ordered to seize the property of the said Blackmer to the amount and value of $100,000 or so much thereof as may be found and to hold the same until further ordered by the court for the purpose of satisfying any judgment that might be rendered against the said Blackmer in the said proceeding. The marshal, having made such levy and seizure, was ordered to forward to the consul of the United States at Paris, France, a copy of the said order with the request that the said consul should make personal service thereof upon the said Blackmer and make prompt return thereof to the Clerk of this Court and that the marshal should make personal service of said order, if said Blackmer should be found within the United States, and, having made the levy and seizure, to cause the order to be published in The Evening Star, a newspaper of general circulation. The publication was made. (R. 5132, pp. 11-12)

3½% Liberty Bonds were seized and held by the United States marshal, they being the same bonds seized and held by the said United States marshal, as set forth in the record in case No. 5131. Due return was made that the order was published in The Evening Star; (R. 5132, p. 12) that the bonds were seized by the United States marshal

(R. 5132, p. 14) and that George Orr, consul of the United States, personally served the said Blackmer with a copy of the said order on the 21st day of January, 1929, at Paris, France. (R. 5132, p. 14).

SUMMARY OF FACTS.

The record clearly shows in each case that a petition was filed with the court for the issuance of a subpoena for the said Blackmer; that an order was issued directing the issuance of the subpoena and the tender to him of Five Hundred Dollars ($500.00) in each case to cover his necessary expenses in traveling to and from Washington and his attendance in court; that the subpoenas were sent to the United States consuls in France; that they were served personally by said consuls upon the said Blackmer in Paris, France, and that tender in each case of Five Hundred Dollars ($500.00) was made to him, as hereinbefore set out. The witness failed to appear in the first case on October 17, 1927, the date named in the subpoena, and being called by the Clerk he failed and neglected to appear.

In the second case the subpoena required his appearance on April 2nd. He did not appear. The case was continued by order of the court until April 9th when the trial was begun. Blackmer failed to appear. His name was called.

A petition was filed in each case in the Supreme Court of the District of Columbia by Government Counsel for an order that Blackmer show cause why he should not be adjudged guilty of contempt of court in neglecting, failing and refusing to obey the said subpoenas. The marshal was ordered to seize and did seize the property described, and caused the order to be published in The Evening Star. The orders were forwarded to the United States Consuls and were personally served upon the said Blackmer. In a word

the procedure in each case was in our judgment in substantial, if not literal, accord with the provisions of the Act of July 3, 1926.

The two cases were tried together and a fine of $30,000 and costs adjudged in each case to be satisfied by the property seized.

In the court below the appellant filed a motion in each case to vacate and set aside the order to show cause. In case No. 16 below (R. 5131) Counsel for the appellant filed a brief from which we quote as follows:

> "* * * The proceedings here in question, however, were all taken in exact pursuance of an Act of Congress purporting to validate them and enacted for the very purpose of validating such proceedings in this particular case against this particular respondent. The question thus reduces itself to a consideration of the constitutionality of this legislation."
>
> (Appellant's Brief for the Respondent in Support of Motion to Vacate Proceedings, page 4.)

SUMMARY OF THE ACT AND PROCEEDINGS THEREUNDER.

Section 1 of the Act provides that the witness, if a citizen of the United States, or domiciled therein, refuses to respond to letters rogatory, addressed to any court of any foreign country, the court issuing such letters may authorize the issuance of a subpoena for such witness, to be served by any consul of the United States within the country where such witness may be, commanding him to appear before the court issuing such subpoena at a time and place designated. This section suffices for the purpose of any party to a civil action, and of a defendant in a criminal action, or in a contempt proceeding. The defendant in a criminal action has the right to letters rogatory. The United States does not have a corresponding right. If the

defendants in the Sinclair-Fall criminal conspiracy case desired the testimony of the appellant, they could have obtained letters rogatory and, if appellant had refused to respond, they could have subpoenaed him as a witness with like result to him, as in the pending case. The appellant also could have obtained letters rogatory in these contempt cases for any witness, a citizen of the United States or domiciled therein, and enforce the subpoena, as provided for in this Act.

Section 2 provides that in a criminal action the court, upon application of the Attorney General, or any Assistant or District Attorney, acting under him, may upon "a proper showing" order a subpoena to be issued and addressed to a United States consul for any witness desired, who is a citizen of the United States or domiciled therein and is beyond the jurisdiction of the United States. A petition was filed in each case and on the showing made the court ordered the subpoenas to be issued and served.

Under Section 3 it was made the duty of the consul to serve such subpoena personally and to make return thereof to the court issuing same, tendering to the witness the amount fixed by the court issuing the subpoena for his necessary expenses in traveling to and from the place of court and in attending thereon, said amount to be supplied to the consul making the service. This was done. (R. 5131, pp. 4, 43, 45) (R. 5132, pp. 4, 24, 26)

Section 4 of the Act provides that if the witness served shall neglect or refuse to appear, as in the subpoena directed, the court issuing the same, shall, upon proof being made of the service and default, issue an order directing the witness to appear before the court at a time in such order designated to show cause why he shall not be adjudged guilty of contempt and punished accordingly. This gives the recusant witness the notice and hearing necessary

to due process. The witness did not respond to the subpoenas and did not appear at either trial. (R. 5131, pp. 45-6) (R. 5132, pp. 26-27) Counsel for the United States presented a petition, or application in writing, to the court out of which the subpoenas had issued, showing *inter alia* the personal service made by the consuls, the tender of Five Hundred Dollars ($500.00) for expenses, the return of the consul, and that the witness did not respond to the subpoenas. (R. 5131, pp. 4-11) (R. 5132, pp. 5-9) The court, thereupon, in each case issued an order directing the appellant to appear before the court at a fixed time to show cause why he should not be adjudged guilty of contempt and punished. (R. 5131, pp. 11-12) (R. 5132, pp. 11-12)

Section 5 provides that the court, issuing such order, may direct the property of any such witness at any place within the United States, or so much thereof in value as the court may direct, to be levied upon and seized by the United States Marshal, to be held to satisfy any judgment that may be rendered against such witness. The court in each case directed the seizure of the witness's property to the value of $100,000. This was done. The same property was seized and held in the second case that was seized and held in the first case. Neither levy was abandoned.

Section 6 provides that the marshal, having made such levy, shall forward, to the United States consul of any country where the recusing witness may be, a copy of such order to show cause why such witness should not be adjudged guilty of contempt, with the request that the said counsel make service of the said order personally upon the recusing witness and cause the order to show cause and for the sequestration of the property of such witness, to be published in some newspaper of general circulation in the district within which the court, issuing the order, sits, once a week for six consecutive weeks. All of this was done. (R. 5131, pp. 12-14) (R. 5132, pp. 12-14)

In each case the order to show cause, as above described, was forwarded by the marshal to the United States consul at Paris and was personally served upon the witness and return of such service made, (R. 5131, pp. 12-13) (R. 5132, p. 14) and publication in each case was made in The Washington Evening Star, as directed. (R. 5131, pp. 14-16) (R. 5132, p. 12)

Section 7 of the Act provides that on the return day of the order to show cause, or any later day to which the hearing may be continued, proof shall be taken. If the charge of recusancy is sustained, the court shall adjudge him guilty of contempt and may impose upon him a fine not exceeding $100,000 and direct the amount thereof and the costs to be satisfied, unless paid, by the sale of the property of the witness so seized or levied upon.

The full text of the Act of July 3, 1926 is printed as an appendix hereto.

In each case a hearing was had on the 16th and 17th of September 1929. (R. 5131, p. 72) (R. 5132, p. 56)

The witness, Blackmer, was represented by counsel since shortly after May 17, 1927, the day when he was first served with a subpoena to appear in court and was given every opportunity to test the validity of the proceedings in the interval from the date of the first citation to the time of trial. We say that he was so represented by counsel since shortly after May 17, 1927, because Mr. George Gordon Battle testified (R. 5131, p. 77) (R. 5132, p. 70) that he was in Paris, France, in the summer of 1927 just after the first subpoenas had been served on Mr. Blackmer, saw him there at the time, discussed with him the constitutionality of the Walsh Act and of the procedure and advised him as to what his action should be with respect to responding to the subpoena. He told Blackmer that they (he and several other eminent attorneys) had considered very careful-

ly the constitutionality of the Walsh Act and that in their judgment it was unconstitutional and that the subpoena "was not a valid obligation upon him." The pleas of the appellant admit all the facts deemed by the Government Counsel to be necessary, except the official character of the consul serving the subpoenas and orders. This was proven in one case and admitted in the other. (R. 5131, pp. 73-74) (R. 5132, p. 59)

From a constitutional standpoint the procedure provided for in the Act of July 3, 1926, does not differ from the procedure with reference to suits to enforce liens against absent defendants, Section 57 of the Judicial Code. (U. S. C. A. Title 28, Section 118)

THE CONSTITUTIONALITY OF A STATUTE WILL BE PRESUMED.

A declaration that an Act of Congress is unconstitutional "should never be made except in a clear case." (Chief Justice Waite in the *Sinking Fund Cases*, 99 U. S. 700, 718)

To the same effect: Chief Justice Marshall in the case of *Fletcher v. Peck*, 6 Cranch, *87, *128; Mr. Justice Washington in the case of *Ogden v. Saunders*, 12 Wheat. *213, *270; and see, *Briscoe v. Bank of Kentucky*, 8 Pet. 118, 122; *Railway Company v. Wellman*, 143 U. S. 339, 345, 346; *Brown v. Walker*, 161 U. S. 591, 596; *Naganab v. Hitchcock*, 25 D. C. App., 200, 205; *Cooley's Principles of Constitutional Law*, 163, *et seq.*; 1 *Roses Notes* 396, 397, *et seq.*; and 2 *Roses Notes* 412, 418, *et seq.*

The principle of these cases can not be doubted. They are cited only for convenient reference.

ANSWERING PETITIONER'S POINT A.

I. THE ACT OF JULY 3, 1926 AND THE PROCEEDINGS HEREIN DO NOT VIOLATE DUE PROCESS UNDER THE FIFTH AMENDMENT OF THE CONSTITUTION.

We do not claim the government has the right to invade by force the territory of another sovereignty against its will.

We do claim that the government has the right to recall its citizens who may be abroad for military service. By the same token it can recall them as witnesses. The means and method to be adopted are for the Congress to determine. The United States possesses the inherent sovereign power to recall its citizens from abroad. No one doubts the power of Congress by statute to authorize the President to recall its citizens who may be abroad to serve the country in time of war and to provide for penalties on failure to respond. Similarly in the administration of justice the Congress has a right to provide for the issuance of subpoenas and to have them served, as in this instance, by some designated individual. In the case at bar the Act of July 3, 1926 provides that the subpoena shall be directed to a consul of the United States in the country where the witness is residing. We submit the consul in making this service is not acting in a sovereign capacity. Rather he is acting in a ministerial capacity because of the order of the court under the statute.

Citizens owe allegiance to their sovereign in exchange for protection. They owe the same duty to obey the Constitution and the laws whether at home or abroad. Constructively the citizen witness is presumed to know the law. Actually he had personal knowledge of this law. (R. 5131, p. 77) (R. 5132, p. 70)

His duty to obey follows him wherever he is. The purpose of the Congress, in designating the consul to serve the subpoena and the orders, was no doubt to avoid un-

certainty and to save the expense of sending a special deputized officer from the United States to make service. In our judgment the service from a constitutional standpoint might just as well have been made by registered letter, or by telegram, if so authorized by statute. The essential thing was to give notice, not the method of giving it. He was personally served with the subpoena and the order. By what excuse can he avoid the consequence. If he had received the notice within the United States, he would have been compelled to comply at his peril. Is his duty to obey any the less because he received the notice abroad by direction of the court and under the authority of an Act of Congress?

II. DUTY OF PROTECTION OF THE CITIZEN BY THE GOVERNMENT AND OBEDIENCE BY THE CITIZEN TO HIS GOVERNMENT WHETHER AT HOME OR ABROAD.

The Constitution and the laws passed in pursuance thereof follow the citizen wherever he may be.

Carlisle v. United States, 16 Wall. 147 (1872). Mr. Justice Field, at page 154, said:

> "By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives. * * *"

Minor v. Happersett, 21 Wall. 162 (1874). Mr. Justice Waite said:

> "* * * He (a citizen) owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance."

Luria v. United States, 231 U. S. 9 (1913). Mr. Justice Van Devanter, at page 22, said:

> "Citizenship is membership in a political society and implies a duty of allegiance on the part of the

member and a duty of protection on the part of society. These are reciprocal obligations, one being compensation for the other."

Rose v. Himely, 4 Cranch 241 (1808). Mr. Chief Justice Marshall, at page 279, said:

"It is conceded, that the legislation of every country is territorial; that beyond its own territory, *it can only affect its own subjects or citizens.*"

The Appollon, 9 Wheat. 362 (1824). Mr. Justice Story, in his opinion at page 370, said:

"The laws of no nation can justly extend beyond its own territories, *except so far as its own citizens.* They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction."

Willoughby on the Constitution, at page 247, section 120:

"* * * Thus he (the citizen) does not in any way lose his citizenship by departing from the territorial limits of the State of which he is a member, *nor does he escape from beneath its law or cease to be entitled to its protection.*"

In Section 121, page 248, the same author says:

"In the preceding section it has been shown that a State has absolute legal authority over all persons within its territorial jurisdiction, and *over its own citizens wherever they may be.*"

To like effect see *Miller on the Constitution of the United States,* pages 294-295; *Vattel, "The Law of Nations,"* 1853 Edition, pages 105, 172, 173 and 174.

Moore: International Law Digest, Volume II, page 256:

In discussing punishment by the State for acts of its citizens done abroad, it is said:

"It is not to be doubted that each state may, in the exercise of its sovereignty, punish its own citizens

for such acts and in such manner as it may deem proper."

Charles Cheney Hyde: International Law, Volume I, page 424, paragraph 240:

> "It is generally agreed that a State may punish its own nationals for disobeying its commands while within a foreign country, notwithstanding the legal quality which the territorial sovereign may have annexed to the acts of disobedience. * * *"

III. UNDER THE ENGLISH COMMON LAW AND THE ACTS OF PARLIAMENT CITIZENS ABROAD AND NOT RETURNING HOME WHEN SUMMONED ARE GUILTY OF CONTEMPT.

In 1559 The Exchequer decided the case of *Bartue and Duchess of Suffolk* (2 Dyer's Reports 176b). Queen Mary had given Bartue permission to go to Germany to collect debts due the estate of the Duke of Suffolk. The Duchess of Suffolk followed without license. In truth both left for religious reasons. The Queen sent a messenger with summons under seal commanding their return, but their servants attacked the messenger and forced his return without service of the summons. The messenger reported to chancery and chancery issued *mittimus* to exchequer. Exchequer issued a commission to a gentleman in Lincoln County reciting the contempt and directed seizure of all real, personal and mixed property of the fugitives and return of rents into the exchequer. This was done until 1558 when the fugitives filed a traverse in the exchequer to the charge of contempt alleging they did not adhere to enemies of England and that the purpose for granting the license had not been completed. The Judges held the fugitives guilty of contempt.

In 1579 the Exchequer division of Court of Common Pleas decided *Knowles v. Luce* (Moore 109; 72 English Reports, Full Reprint, 473). Knowles brought ejectment against Luce involving a copyhold. The question was the

validity of the seizure under order of the Queen. The property had belonged to Englefield who was given a license to go abroad. Subsequently the Queen sent a messenger with summons for his return, which was served and not obeyed. The Queen issued a warrant reciting the contempt and directing the commissioners to seize his property. The income thereafter was paid to the Queen. The procedure was repeated in 1570 under a statute that year passed. The finding was for Knowles and it was said in the opinion:

> "The reason for the judgment as it was delivered by Manwood, Chief Barron, was such (that is) that the thirteenth and fourteenth statutes of Elizabeth were made in accordance with the common law, and did not give the Queen any new right, but only explained what she had before; *for by ancient prerogative, the Queen had a natural interest in the person of each subject, to serve her in such capacity as she should appoint;* and for this the common law gives the principle of *'non exeas Regnum'* (Do not leave the Country) before the subject goes outside of the Realm, *and when he is overseas, the common law gives the Queen liberty to recall him, and if he does not wish to return then the Queen can seize his lands until he returns, and use the profits in the maintenance of others to do the service that he would do her if he were in the Realm; and also to restrain him from the ability and power of continuing in his disobedience;* and with respect to this he cites two precedents in the Exchequer, viz. the case of Mortymer in the reign of Edward II and the case of Bartue in the reign of Queen Mary."

IV. UNDER THE REVENUE ACTS NON-RESIDENT CITIZENS ARE LIABLE FOR TAXES ON INCOME EARNED IN BUSINESS IN FOREIGN COUNTRIES.

In *Cook v. Tait,* 265 U. S. 47 (1924) under the Revenue Act of 1921, Section 210 (42 Stat. 227, 233) the United States taxes non-resident citizens upon their income from earnings not within the territorial domain of the United

States. The Supreme Court held this statute a constitutional exercise of sovereign jurisdiction. Cook sued Tait, a Collector of Internal Revenue. Cook was a native citizen of the United States domiciled in Mexico. Under protest he made a return of his income from property situated in Mexico. He began suit to recover. A demurrer to the petition was sustained. The Supreme Court affirmed it. Mr. Justice McKenna, delivering the opinion, on page 54, said:

> "Plaintiff assigns against the power not only his rights under the Constitution of the United States but under international law, and in support of the assignments cites many cases. It will be observed that the foundation of the assignments is the fact that the citizen receiving the income, and the property of which it is the product, are outside of the territorial limits of the United States. These two facts, the contention is, exclude the existence of the power to tax. Or to put the contention another way, as to the existence of the power and its exercise, the person receiving the income, and the property from which he receives it must both be within the territorial limits of the United States to be within the taxing power of the United States. The contention is not justified, and that it is not justified is the necessary deduction of recent cases."

The court rejected the contention that a citizen's property without the limits of the United States derives no benefit from the United States. It decided the government's power is based on the presumption that government by its very nature benefits the citizen and his property wherever found.

Mr. Justice McKenna further adds: (p. 56)

> "* * * Or to express it another way, the basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or out of the United States, *and was not and cannot*

*be made dependent upon the domicile of the citizen, that being in or out of the United States, but upon his relation as citizen to the United States and the relation of the latter to him as citizen. * * *"*

V. CITIZENS PUNISHABLE IN THE UNITED STATES FOR OFFENSES COMMITTED ON THE HIGH SEAS OR IN FOREIGN COUNTRIES.

United States v. Bowman, 260 U. S. 94 (1922). The indictment was for a criminal conspiracy to defraud the United States Shipping Board. The defendant in error and others conspired on the high seas for the delivery at Rio de Janeiro by the Standard Oil Company of 600 tons of oil and to charge the Emergency Fleet Corporation for 1,000 tons and then divide the money for the undelivered 400 tons among themselves. 600 tons of oil were delivered at Rio de Janeiro. Payment was collected for 1,000 tons. A demurrer was filed to the indictment upon the ground of lack of jurisdiction because the crime was committed on the high seas or within the jurisdiction of Brazil. The demurrer was sustained and the indictment quashed. In reversing the judgment of the District Court Mr. Chief Justice Taft, in discussing the extraterritorial jurisdiction of the United States, said: (pp. 98-100.)

"But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents. Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on

the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense. Many of these occur in c. 4, which bears the title 'Offenses against the operations of the Government.' Section 70 of that chapter punishes whoever as consul knowingly certifies a false invoice. Clearly the locus of this crime as intended by Congress is in a foreign country and certainly the foreign country in which he discharges his official duty could not object to the trial in a United States court of a United States consul for crime of this sort committed within its borders. Forging or altering ship's papers is made a crime by Sec. 72 of c. 4. It would be going too far to say that because Congress does not fix any locus it intended to exclude the high seas in respect of this crime. The natural inference from the character of the offense is that the sea would be a probable place for its commission. Section 42 of c. 4 punishes enticing desertions from the naval service. Is it possible that Congress did not intend by this to include such enticing done aboard ship on the high seas or in a foreign port, where it would be most likely to be done? Section 39 punishes bribing a United States officer of the civil, military or naval service to violate his duty or to aid in committing a fraud on the United States. It is hardly reasonable to construe this not to include such offenses when the bribe is offered to a consul, ambassador, an army or a naval officer in a foreign country or on the high seas, whose duties are being performed there and when his connivance at such fraud must occur there. So, too, Sec. 38 of c. 4 punishes the wilfully doing or aiding to do any act relating to the bringing in, custody, sale or other disposition of property captured as prize, with intent to defraud, delay or injure the United States or any captor or claimant of such property. This would naturally often occur at sea, and Congress could not have meant to confine it to the land of the United States. Again, in Sec. 36

of c. 4, it is made a crime to steal, embezzle, or knowingly apply to his own use ordnance, arms, ammunition, clothing, subsistence, stores, money or other property of the United States furnished or to be used for military or naval service. It would hardly be reasonable to hold that if any one, certainly if a citizen of the United States, were to steal or embezzle such property which may properly and lawfully be in the custody of army or naval officers either in foreign countries, in foreign ports or on the high seas, it would not be in such places an offense which Congress intended to punish by this section." * * *

and further, at page 102:

"* * * We cannot suppose that when Congress enacted the statute or amended it, it did not have in mind that a wide field for such frauds upon the Government was in private and public vessels of the United States on the high seas and in foreign ports and beyond the land jurisdiction of the United States, and therefore intended to include them in the section."

* * * * * *

"* * * The three defendants who were found in New York were citizens of the United States and were certainly subject to such laws at it might pass to protect itself and its property. *Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the government to which they owe allegiance.* * * *"

If then the Congress of the United States can make an act committed by an American citizen in a foreign country, or on the high seas, criminal and punishable within the United States, as the learned Chief Justice Taft pointed out in *United States v. Bowman, supra,* it is hard to conceive any sound reason why a witness, a citizen of the United States, residing abroad, served with a subpoena issued by the court under the authority of the Congress, can refuse to obey its command without being in contempt.

If, as the learned Chief Justice further pointed out, the Congress should limit the locus of offenses to the strictly territorial jurisdiction of the United States, it would greatly curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home.

Adopting the same thought, if we limit the jurisdiction of our courts in contempt proceedings, to those who are served with process within the United States, and make no provision to compel attendance of witnesses who are citizens, and who are beyond the bounds of the United States, we would make immune contempts of court which are as easily committed beyond as within the territory of the United States.

The United States did not seek to serve the subpoena, or the order of the court, upon Blackmer against the will of France. The record does not disclose that France raised any objection to the service of the subpoena, or the order of court, citing Blackmer for contempt. If France made, or was inclined to make any such protest, it would have been evidenced through the proper diplomatic channels. Blackmer is a citizen of the United States and subject to its sovereign will, whether at home or abroad. France has not delegated, so far as the record shows, to Blackmer the authority to make this protest. Blackmer is acting in his own behalf, not in behalf of France. His concern upon its face is more for the sovereignty of France, to which he owes no allegiance, than for the sovereignty of his country from which he receives protection and owes allegiance and obedience whether at home or abroad.

Obviously the United States could not invade France and kidnap Blackmer without her consent. That would offend the dignity and peace of France, but the Congress can create an obligation upon Blackmer to return as a wit-

ness which might be subject to penalties for a breach which could not disturb France:

1. by arrest upon his return;
2. by expatriation, or
3. by forfeiture of property within the control of the United States.

Any other limitation upon the extraterritorial power of a sovereign over its citizens abroad is unsound in principle and contrary to authority.

Thus, a sovereign may require its citizens to return for military duty and to pay taxes on his property at home or abroad. If so, why cannot the sovereign require such witness to give testimony for the sovereign, or to do any other act of allegiance, or of civic or military duty, and enforce such requirements in any way not inconsistent with the peace, dignity and equality of the alien sovereign, provided that in this country, under our Constitution the witness is given a reasonable opportunity to be heard and to show why apparent disobedience is not actual disobedience.

VI. APPELLANT FAILS TO SEE THAT THIS PROCEEDING IS ONE QUASI IN REM OR IN REM AND NOT IN PERSONAM.

The judgment rendered in these cases is only enforceable against the property seized. No effort has been made, or could be made, to enforce it personally, or against property other than that which was seized. If it could not be thus satisfied in whole or in part, we are not claiming that property could be seized elsewhere, as in a judgment *in personam*.

The authorities cited by the petitioner are inapt.

They are either:

1. Cases which recognize that sovereigns have extra-territorial power as

Schooner Exchange v. M'Faddon, 7 Cranch, 116 (Plaintiff's Brief, p. 24); or

2. Cases which hold that a state court, in absence of a statute so authorizing, may not render a *personal* judgment against a defendant not found within the state and not a resident thereof as

Pennoyer v. Neff, 95 U. S. 714,

but it does recognize that *the jurisdiction of the court extends only over property within the state.*

To the same effect:

Picquet v. Swan, 5 Mason 35;

Galpin v. Page, 18 Wall. 350; or

3. Cases holding that a state cannot compel non-resident aliens to personally respond to a subpoena *in the absence of a statute* as in

Minder v. Georgia, 183 U. S. 559; or

4. Cases holding that a state court may not, *in the absence of a statute,* render a personal judgment against *an absent citizen who was not personally served* with process within the state, or did not voluntarily enter an appearance; said cases, however, holding the validity of judgment in cases *quasi in rem* to the extent of the "*res,*" as in

Cooper v. Reynolds, 10 Wall. 308; or

5. Cases turning upon the *absence of or insufficiency of* necessary federal legislation as in

Toland v. Sprague, 12 Peters 300,

in which the court said: (page 329)

"The process of a circuit court cannot be served without the district in which it is established, *without the special authority of law therefor.*"

and

Robertson v. Railroad Labor Board, 268 U. S. 619,

which holds that under the Transportation Act a district court in one district cannot issue and serve its

process in another judicial district *without authority of statute;* or

6. Cases which concern the enforcement of foreign judgments in this country and have no bearing on the allegiance and duties which an absent citizen owes the United States as

Bischoff v. Wethered, 9 Wall. 812,

in which appears this language concerning a judgment rendered *in England by virtue of a statute:*

"Whatever validity it may have in England, by virtue of statute law, against property of the defendant there situate, it can have no validity here"; or

7. Cases holding one nation may not invade another without its consent or establish an admiralty court there without a treaty as

Glass v. The Sloop Betsey, 3 Dallas 6.

Counsel for the petitioner refer to a number of cases in which it is held that a personal judgment cannot be rendered against an absent defendant. So far as we know in all said cases a judgment *in rem* can be rendered so as to subject property seized, as under attachment in the States, to the payment of said claim or judgment.

Counsel for petitioner cite no case holding that the Congress can not authorize the courts to cause service of process to be made beyond the territorial confines of the United States.

We are not contending that a judgment *in personam* may be rendered in the cases at bar without enabling legislation.

VII. A JUDGMENT IN PERSONAM MAY BE RENDERED IN STATE COURTS AGAINST A CITIZEN ABSENT FROM THE STATE, WHERE SERVICE IS PERSONALLY MADE WITHOUT THE STATE UNDER A STATUTE SO AUTHORIZING.

In state courts a personal judgment may be rendered against a citizen absent from the state where personal service is made without the state.

In Massachusetts it has always been held that a personal judgment can be rendered against an absent citizen of the state provided that actual service of the pendency of the case was given him.

In *Nichols v. Vaughan,* 217 Mass. 548, Rugg, *C.J.,* quotes approvingly from Chief Justice Bigelow in *Langdon v. Doud,* 6 Allen, 423, at page 425 the following:

> "So long as a debtor has a last and usual place of abode in the commonwealth, that is, while he retains his domicile or residence here, the courts of the state have jurisdiction over him, and due service of legal process can be made upon him. * * * A writ can be served by leaving a summons at his last and usual place of abode, and in the case of his absence from the state actual notice * * * can be given to him, so that a valid and binding judgment can be obtained."

To the same effect *In Re Hendrickson,* 167 N. W. Rep. 172 (1918) the Supreme Court of South Dakota notes approvingly 35 L. R. A. pp. 296-297 and adds:

> "We therefore conclude that under our laws, which do not violate the principles of due process of law in so far as absent citizens of this state are concerned, the County Court of Hamlin County acquired jurisdiction over the person of the alleged incompetent by the service of a citation upon her in the State of Minnesota."

Under the Act of July 3, 1926, special authority to serve the subpoena and the order of the court was specially given by the Act of Congress.

VIII. CONTEMPT—PROCEEDINGS ARE SUI GENERIS.

The appellant fails utterly to distinguish between crimes and criminal contempts. The proceedings herein are not *in personam*, but *quasi in rem* or *in rem*.

The contempt proceedings are *sui generis*. Indictments, or informations, in the ordinary acceptation of these terms are not required. There is no fixed formula for contempt proceedings.

Schwartz v. United States, 217 Fed. 866 (C. C. A. 4th Circ., 1914). On page 868 Circuit Judge Woods said:

> "* * * There is no fixed formula for contempt proceedings, and technical accuracy is not required. *It is sufficient if the offense is set out, so that the defendant is clearly informed of the charges against him and whether a criminal or civil contempt is alleged;* and this is to be determined by examination of the entire record."

Gompers v. Bucks Stove & Range Co., 221 U. S. 418.

In *Myers et al. v. United States*, 264 U. S. 95 (1924) Mr. Justice McReynolds, in delivering the opinion, said that contempt proceedings are "*sui generis.*"

> "* * * neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms—and exertions of the power inherent in all courts to enforce obedience, something they must possess in order properly to perform their functions. *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 326."

> "* * * While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offenses have been regarded as *sui generis* and not 'criminal prosecutions' within the Sixth Amendment or common understanding."

In upholding the constitutionality of certain provisions of the Clayton Act, requiring a jury trial in certain speci-

fied kinds of contempt, Mr. Justice Sutherland in *Michaelson v. United States,* 266 U. S. 42 (1924) said:

> "But it is contended that the statute materially interferes with the inherent power of the courts and is therefore invalid. That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior federal courts are concerned, however, it is not beyond the authority of Congress (*Ex Parte Robinson,* 19 Wall. 505, 510-511; *Bessette v. W. B. Conkey Co.,* 194 U. S. 324, 326); but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative. *That it may be regulated within limits not precisely defined may not be doubted. The statute now under review is of the latter character.*"

Further on Mr. Justice Sutherland said:

> "This is also pointed out by counsel in the case of *O'Shea v. O'Shea and Parnell,* L. R. 15 Prob. Div. 59, 61; and, in the course of one of the opinions in that case, it is said:
>
> "'The offense of the appellant (criminal contempt) is certainly a criminal offense. I do not say that it is an indictable offense, but, whether indictable or not, it is a criminal offense, and it is an offense, and the only offense that I know of, which is punishable at common law by summary process.'"

In Re Gompers, 40 App. Cases (D. C.) 293 (1913) Mr. Justice Van Orsdel, in discussing contempt of court, said (pp. 322-323):

> "In the decisions, the courts have expressed a variety of views as to the nature of the action for the punishment of contempts. Some have held it to be a criminal proceeding, in that a penalty is attached;

some have held it to be in the nature of a criminal proceeding. Penalty and punishment are not alone sufficient to distinguish the proceeding as criminal. The action is *sui generis*, in a class by itself, partaking of some of the elements of both civil and criminal proceedings, but, strictly speaking, it is neither. It belongs to a class of proceedings inherent in the court, and deemed essential to its existence. * * * Contempt, therefore, is without any particular form of action, and not subject to the limitations of procedure prescribed for the conduct of either civil or criminal actions. * * *"

The proceedings herein do not differ in principle from proceedings *in rem* recognized in attachment proceedings under the State laws, or from the proceedings *in rem* authorized by Section 57 of the Judicial Code with respect to absent defendants in suits to enforce legal or equitable claims, or to quiet title.

In *Central Loan & Trust Company v. Campbell Commission Company*, 173 U. S. 84 (1899) Mr. Justice White said:

"* * * In a proceeding by attachment of property, which is in the nature of an action *in rem, it is elementary that the defendant is found, to the extent of the property levied upon, where the property is attached.* It would be an extremely strained construction of the language of the act to hold that Congress intended to prohibit a remedy universally pursued, that of proceeding against the property of non-residents in the place in the territory where the property of such non-resident is found."

In *Missouri v. North*, 271 U. S. 40 (1926) Mr. Justice Stone, at page 42, said:

"The due process clause does not guarantee to a citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be

heard and to present his claim or defense, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it."

IX. PROCESS OF A COURT MAY EXTEND BY LEGISLATIVE AUTHORITY FROM ONE DISTRICT TO ANOTHER.

The petitioner cites *Big Vein Coal Company v. Read*, 229 U. S. 31, in which a question arose as to whether a remedy by attachment could be had in the Circuit Court of the United States where personal service could not be made on the defendant. Mr. Justice Day, delivering the opinion, held that, under the federal statute, the defendant must be subject to personal service or voluntarily appear before the right of attachment could obtain. He adds at page 38:

"* * * If Congress had intended any such radical change, it would have been easy to have made provision for that purpose, and doubtless a method of service by publication in such cases would have been provided. * * *"

Such method has been provided by Congress under the Act of July 3, 1926 involved herein.

In *Mellen v. Moline Iron Works*, 131 U. S. 352, in an action to quiet title in the federal court of Illinois, one of the defendants was a citizen of Ohio and was personally served under Section 57 of the Judicial Code, but he failed to appear and defend and was denied the right within one year to move to reopen the case.

In U. S. C. A: Title 28, Judicial Code & Judiciary, Chapter 2, Paragraph 26, in insurance cases in an action for interpleader federal courts are authorized to issue process extending to claimants in any other district of the United States.

X. LIKEWISE PROCESS OF COURT MAY BE EXTENDED BY CONGRESS TO FOREIGN COUNTRIES.

Thus, it is clear, that when sufficiently authorized by statute a court's process may run to a foreign country in such a way as to give the court jurisdiction over matters subject to its territorial jurisdiction.

Section 57 of the Judicial Code (U. S. C. A. Title 28, Sec. 118) provides that in any suit begun in any District Court of the United States to enforce any legal or equitable lien, or to quiet title to real or personal property within the district where such suit is brought, if one or more of the defendants therein is not an inhabitant of, or found within the district, upon order of the court, he may be required to appear and plead. If not found in the district he may be served *"if practicable, wherever found."* This statute was under consideration by this Court in *Perez v. Fernandez,* 220 U. S. 224. In that case the property in suit was located in Porto Rico. The defendant, Perez, was a citizen and resident of Spain. The marshal made the return that he could not be found for personal service. Publication was had. Under the statute within a year Perez applied to set aside the judgment. The plain and necessary implication of the decision is that under Section 57 of the Judicial Code a court of the United States has power to base its jurisdiction upon personal service outside of its district and in a foreign country. (See pp. 230-231)

XI. NO SPECIAL FORM OF PROCEDURE OR NOTICE REQUIRED.

In *Cooke v. United States,* 267 U. S. 517 (1925) Mr. Chief Justice Taft, in discussing contempt in open court, said (pp. 536-537):

> "* * * there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and

argument. The exact form of the procedure in the prosecution of such contempts is not important. * * *"

"The court in *Randall v. Brigham*, 7 Wall., 523, 540, in speaking of what was necessary in proceedings against an attorney at law for malpractice said:

> 'All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, *notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation.*'

"The court in *Savin, Petitioner*, 131 U. S. 267, applied this rule to proceedings for contempt.

> "*Due process of law, therefore, in the prosecution of contempt*, except of that committed in open court, *requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation.* * * *"

Applying these principles we have in the cases pending subpoenas served personally by order of the court, expense money tendered, neglect to appear, an order of the court to show cause why he should not be punished for contempt, notice thereof personally served, a hearing, and his own counsel testifying that he advised Blackmer that the Act was unconstitutional, the proceedings thereunder illegal and in mitigation testifies that for the reasons stated Blackmer did not appear. All of this gives notice of the offense charged and a reasonable opportunity to be heard. Due process of the Fifth Amendment of the Constitution is therefore not violated.

ANSWERING PETITIONER'S POINT B.

THE PROCEEDING IS QUASI IN REM, OR IN REM, NOT IN PERSONAM.

Answering petitioner's Point B, to the effect that the Act does not provide due process, we adopt, without repeating here, our previous argument on Point A. With due respect the petitioner seems to misunderstand. It must be construed as a whole, not piecemeal. The witness was served personally. He refused to appear. On petition of the government the court issued the order to show cause and to seize the property. Again, the witness was served personally with a copy of the order. A cause of action in contempt is thus stated. It is similar to a civil action with the writ of attachment ancillary thereto. The plaintiff in a civil suit is obliged to make proof of his claim on trial before the attached property can be subjected to its payment. So here the government makes out its charge of contempt and the court, if the recusant witness is found guilty, assesses the fine before the property seized can be subjected to its payment. Of course, this proceeding is based upon the Act of July 3, 1926. We concede that without this legislation it could not be maintained.

ANSWERING PETITIONER'S POINT C.

THE PETITIONER HAD ACTUAL NOTICE OF THE OFFENSE CHARGED AND THE GOVERNMENT'S CLAIM AGAINST HIS PROPERTY.

A subpoena and the order to show cause were personally served. The witness refused to respond to either. He violated both the subpoena and the order of the court. If any desired information was not disclosed by the subpoena and the order, it was of record in court and available, if he had responded.

The petitioner to sustain his contention refers to the provisions of the Clayton Act (U. S. C. A. Title 28, Sec-

tion 387) relating to certain specific acts. The Clayton law requires that a copy of the affidavit of information shall be served upon the person charged. Such being the requirement of the Clayton Act, it must be complied with.

The Act of July 3, 1926, contains no such provision. The Congress evidently thought that such provision was not advisable or necessary under the Act of July 3, 1926. It does not follow that because the Congress saw fit to use one form of procedure under the Clayton Act that the same form of procedure must be followed in the Walsh Act. No special form of procedure is required in contempt cases under the common law. It can be modified, at least so far as the lower courts are concerned, by the Congress.

Michaelson v. United States, 266 U. S. 42, *supra.*

Having received the notices of the subpoenas and the orders, as above set out, being advised by his own counsel as to the alleged unconstitutionality of the Act and the proceedings thereunder, and there being no provision under the Constitution as to the form of the notice to be served, it does not lie in petitioner's mouth to say that he had no "actual or any other notice" of the offense, or of the government's claim against his property.

ANSWERING PETITIONER'S POINT D.

THE SEARCH AND SEIZURE PROVIDED BY THE ACT IS NOT AN UNREASONABLE SEARCH AND SEIZURE AND DOES NOT VIOLATE THE FOURTH AMENDMENT.

The Act provides in this behalf, Section 5, that the property of the recusant witness, or so much thereof as the court may direct, may be levied upon and seized by the marshal in the manner provided by law, or the rule of the court, for a levy or seizure under execution, to be held to satisfy any judgment. There is not one word in the record showing any "unreasonable search" or any search in fact. It does provide for a levy and seizure, nothing more.

The court limited the amount in each case to be seized at the amount and value of $100,000. There is enough in the record to show that Blackmer was a man of large affairs; that he was living abroad and had been for years; that he refused to testify in the Mammoth Oil Company case; that he was told of the provisions of the Act; that he saw fit to ignore the notices of the court in a case of great importance to the government.

In refusing to find that a penalty of $1,600,000 imposed upon a corporation, guilty of violating the Anti-Trust Law in Texas, was too excessive, the Supreme Court in the case of *Waters-Pierce Oil Company v. Texas,* 212 U. S. 86 (1909); Mr. Justice Day, delivering the opinion, said:

> "The fixing of punishment for crime or penalties for unlawful acts against its laws is within the police power of the State. We can only interfere with such legislation and judicial action of the States enforcing it if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law."

ANSWERING PETITIONER'S POINT E.

THE PROVISIONS OF THE ACT FOR HEARING AND JUDGMENT IN HIS ABSENCE AND WITHOUT HIS CONSENT DO NOT VIOLATE DUE PROCESS.

Again, we must remind the petitioner that this is a proceeding for punishment for criminal contempt and not for a crime. The procedure adopted was a substantial, if not a literal compliance with the statute.

The power to punish for contempt is inherent in all courts. It "may be regulated within limits not precisely defined" by the Congress.

Michaelson v. United States, 266 U. S. 42, *supra.*

While the witness specially appeared, for the purposes of his motion to vacate the order and the proceedings there-

under, because of their unconstitutionality, and again in filing his pleas and amended pleas, and in objecting to the taking of any testimony in the absence of the defendant (R. 5131, p. 73 and R. 5132, p. 57), Mr. George Gordon Battle took the stand in behalf of the defendant to testify in mitigation of the offense charged. (R. 5131, pp. 76-84 and R. 5132, pp. 70-78)

Mr. Justice Robb in delivering the opinion of the Court of Appeals referred to the fact that Mr. George Gordon Battle took the stand in behalf of the defendant to testify in mitigation of the offense and said:

> "This amounted to a general appearance and appellant will not now be permitted to challenge the sufficiency of the rules to show cause."

Blackmer v. United States, 49 Fed. (2d) 523;

Similar authorities:

Bradstreet Company v. Bradstreet's Collection Bureau, 249 Fed. 958 (2 C. C. A. 1918);
Hammond et al. v. District Court, 228 Pac. 758;
Massachusetts Bonding & Insurance Company v. Concrete Steel Bridge Company, 37 Fed. (2d) 695 (4 C. C. A. 1930);
1 *Foster's Federal Practice,* 976.

ANSWERING PETITIONER'S POINT F.

THE PETITIONER COMPLAINS THAT THE ACT VIOLATES THE SIXTH AMENDMENT BECAUSE IT DOES NOT GIVE TO THE DEFENDANT IN A CRIMINAL PROSECUTION THE RIGHT TO EXTRA-TERRITORIAL SUBPOENAS, OR TO HAVE COMPULSORY PROCESS IN HIS BEHALF.

The Sixth Amendment provides for compulsory process, but it does not provide for equal process. Under Section 1 of the Act, if a citizen refuses to respond to letters rogatory, the court, issuing such letters, may authorize the

issuance of a subpoena for such citizen to appear, before the trial court at the time and place designated. The authority under this section is available to either party in a civil case and to the defendant in a criminal action, or in a contempt proceeding. The government cannot take advantage of it, because the Constitution requires that the defendant shall be confronted by the witness against him at the trial. The United States is not entitled to letters rogatory in a criminal case. The defendant may have such letters, and, if the witness refuses to respond, he may be subpoenaed, as provided in the subsequent sections. He, therefore, has substantially equal process to that accorded the United States.

In *United States v. Heinze*, 218 U. S. 532 (1910) the contention was advanced that the defendant in a criminal case was denied due process and equal protection of the law, because he was not accorded rights to appeal equal to those accorded the prosecution. The contention was rejected.

ANSWERING PETITIONER'S POINT C.

THE ACT IS NOT ARBITRARY, CAPRICIOUS AND UNREASONABLE.

When the subpoena was served and the witness failed to respond the contempt was complete. Ownership of property is not an element of the offense. If he is beyond the territorial jurisdiction of the country, then a method is provided for his punishment in part by seizing his property within the territorial jurisdiction of the United States. If he has no property, then the court may be powerless to enforce its order. Because the court may, or may not be able to proceed where the recusant witness has no property, is not a sound reason why another should escape, who has property within the territorial jurisdiction of the court.

As well might it be said that a debtor in a civil action should escape liability, if he was beyond the jurisdiction of the court and had property within its jurisdiction, because another debtor had gone beyond the jurisdiction of the court who had no property within its jurisdiction.

ANSWERING PETITIONER'S POINT H-a.

PROCEDURAL POINTS.

PETITIONER COMPLAINS OF LACK OF PROPER SHOWING FOR SUBPOENAS.

Section 2 provides that upon a "proper showing" the judge before whom the action is pending may issue an order for a subpoena, addressed to any consul where the witness may be, commanding his attendance. It is not for the witness to determine what is a "proper showing." The power is addressed to the court to issue, or not to issue, the subpoena and lies in his discretion. It is assumed he will use a judicial discretion. Nothing in the record shows abuse of judicial discretion, either in the issuing of the subpoena or the order to show cause.

In each case a petition duly signed by the United States Attorney and by two special assistants to the Attorney General, and verified by one of them, was presented to the court; and the order was issued thereon. (R. 5131, p. 3) (R. 5132, p. 3)

ANSWERING PETITIONER'S POINT H-b.

PETITIONER COMPLAINS THAT THE SUBPOENA DID NOT CARRY NOTICE OF THE ACT.

It did not. Constructively the witness knew the law. Actually he was advised by his counsel of the law and its provisions and under the alleged belief on witness' part that it was unconstitutional, he refused to obey.

Petitioner asserts it is not contempt to disobey a witness subpoena served extra-territorially and cites *Robert-*

son v. Railroad Labor Board, 268 U. S. 619. The question there was whether under the Transportation Act the Railroad Labor Board could subpoena a witness from one judicial district to appear in another. The Supreme Court held that under that particular statute no such authority existed. The case is clearly to the effect that the authority to issue and serve such subpoena depends upon the scope of the legislation. We note that subpoenas may be issued under the criminal practice for witnesses in any state of the Union.

Under a statute, which recently expired by limitation, in civil cases the court could order the issuance of a subpoena for a witness extending into any state.

Petitioner complains that the subpoenas are defective because they do not show that they were issued under the authority of the Act. No such provision is contained in this Act, nor in any other Act, so far as we know. One case was cited in the court below sustaining petitioner's contention. It was a Canadian case in which the statute itself expressly provided that such notice should be incorporated in the subpoena.

Directly contrary to the contention of the petitioner the common law does make it contempt to disobey a subpoena issued by the sovereign and served extra-territorially. See:

Bartue and Duchess of Suffolk, and
Knowles v. Luce, supra.

ANSWERING PETITIONER'S POINT H-c.

PETITIONER COMPLAINS THERE WAS NO NOTICE OF THE ALLEGED OFFENSES, OR OF THE CLAIMS AGAINST HIS PROPERTY.

He does not contend as to the form of the notice. He protests the total lack of notice in any form. (Petitioner's Brief, page 44)

If we understand correctly this seems to beg the entire question. We assume he means no constitutional notice was

given. The facts, as heretofore stated, are that the court ordered the subpoena to be issued. It was served personally by the consul and due return thereof made. The order to show cause was likewise issued and personally served. Under the notices thus authorized and personally served the witness was advised by the subpoena:

1. in what case to appear;
2. that it was by order of the President of the United States;
3. when and where to attend court;
4. to testify on behalf of the United States and not to depart without leave.

By the order to "show cause" he was advised:

1. the court in which he was to have a hearing;
2. the time of such hearing;
3. its object;
4. the seizure of the property;
5. the object of the seizure.

This certainly is such notice as to provide due process of law.

ANSWERING PETITIONER'S POINT H-d.

LEVY AND SEIZURE IN NO. 5131 NOT ABANDONED.

In No. 5131 certain bonds were seized. In No. 5132 the same bonds, which had been theretofore seized in No. 5131, were again seized. The seizure in both cases was on behalf of the United States against the same witness. Petitioner claims abandonment in the first case. There is no evidence in the record that the first seizure was abandoned.

As pointed out by Mr. Justice Robb in the court below the authorities cited by the petitioner are:

"to the effect that if in a particular action an alias order is issued before the property taken under the original

writ is disposed of, the alias order destroys the lien acquired by the original writ. These cases are not in point, for here there were two different seizures in two different cases upon two different causes of action."

ANSWERING PETITIONER'S POINT H-e.

PETITIONER CLAIMS HE WAS SUBPOENAED TO ATTEND TRIAL ON APRIL 2, 1928, AND NOT ON APRIL 9, 1928.

Blackmer was subpoenaed to appear on April 2, 1928, as a witness in United States v. Sinclair-Fall. Later the case was continued to April 4, 1928. On April 3, 1928 the court continued the case until April 9, 1928. The witness did not appear on any of the days named. His subpoena directed that he attend to testify on behalf of the United States and "not depart the court without leave of the court or District Attorney." (R. 5132, pp. 8, 78, 79)

U. S. C. A., Title 28, Section 655;
U. S. C. A., Title 28, Section 877.

Had he attended on April 2, 1928, he would have been advised of the continuances of the case.

IN CONCLUSION.

While the government admits that the Act of July 3, 1926 has never been before this Court for construction, the principles involved have been. Citizens, whether at home or abroad, owe allegiance to the country and obedience to the Constitution and the laws in peace, as well as in war.

The petitioner was a citizen of the United States, temporarily residing abroad, and was desired as a witness in the trial of an important case. On the sworn petition of counsel for the government the court issued a subpoena to the American consul in France, directing him to personally serve the witness and to tender him Five Hundred Dollars ($500.00) for traveling expenses and the attendance upon the court. The subpoenas were served personally,

the money tendered and due return thereof made to the court. The witness refused to appear and did not respond when called by the Clerk.

Upon petition in each case by government counsel, showing the procedure as stated, the court issued an order for the witness to appear to show cause why he was not in contempt; his bonds to the amount of $100,000 were ordered seized. They were seized by the marshal to be held to await disposition of the case, and publication of said order made in a paper of general circulation in the District of Columbia. The order, as issued, was served personally upon the witness and published. The witness did not appear and the trial proceeded.

Though the witness appeared specially by counsel for the purpose of his motion to vacate the order, as well as to file his pleas and to object to the trial in his absence, his attorneys appeared and one of them testified, giving the facts in mitigation of his offense.

None of the authorities cited by the petitioner deny the power of Congress to authorize courts to serve their process upon citizens beyond our territorial confines.

We submit that the Congress and the courts ought not to be and are not powerless to serve process upon their citizens when abroad, or to subject their property within the United States to the payment of a fine, which may be assessed because of a flagrant violation of the will of the sovereign.

The government has authority to recall its citizens from abroad for military service.

Why then may not the Congress authorize the court to service notice upon the witness, a citizen of the United States, temporarily sojourning abroad, and compel him to attend court under the terms and conditions set out in the Act of July 3, 1926?

We submit there is no error of the proceedings of the Supreme Court, or the Court of Appeals, of the District of Columbia.

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APPENDIX.

ACT OF JULY 3, 1926.

[PUBLIC—No. 483—69TH CONGRESS]
[S. 1035]

An Act Relating to contempts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever letters rogatory shall issue out of any court of the United States, either with or without interrogatories addressed to any court of any foreign country, to take the testimony of any witness, being a citizen of the United States or domiciled therein, and such witness, having been personally notified by it according to the practice of such court, to appear and testify pursuant to such letters rogatory and such witness shall neglect to appear, or having appeared shall decline, refuse, or neglect to answer to any question which may be propounded to him by or under the authority of such court, to which he would be required to make answer were he being examined before the court issuing such letters, the court out of which said letters issued may upon proper showing order that a subpoena issue addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the said court at a time and place therein designated.

SEC. 2. Whenever the attendance at the trial of any criminal action of a witness, being a citizen of the United States or domiciled therein, who is beyond the jurisdiction of the United States, is desired by the Attorney General or any assistant or district attorney acting under him, the judge of the court before which such action is pending, or who is to sit in the trial of the same, may, upon proper showing, order that a subpoena issue, addressed to any consul of the United States within any country in which

such witness may be, commanding such witness to appear before the said court at a time and place therein designated.

SEC. 3. It shall be the duty of any consul of the United States within any country in which such witness may be at the request of the clerk of the court issuing any subpoena under this Act or at the request of the officer causing such subpoena to be issued, to serve the same personally upon such witness and also to serve any orders to show cause, rules, judgments, or decrees when requested by the court or United States marshal, and to make a return thereof to the court out of which the same issued, first tendering to the witness the amount of his necessary expenses in traveling to and from the place at which the court sits and his attendance thereon, which amount shall be determined by the judge on issuing the order for the subpoena and supplied to the consul making the service.

SEC. 4. If the witness so served shall neglect or refuse to appear as in such subpoena directed, the court out of which it was issued shall, upon proof being made of the service and default, issue an order directing the witness to appear before the court at a time in such order designated to show cause why he should not be adjudged guilty of contempt and be punished accordingly.

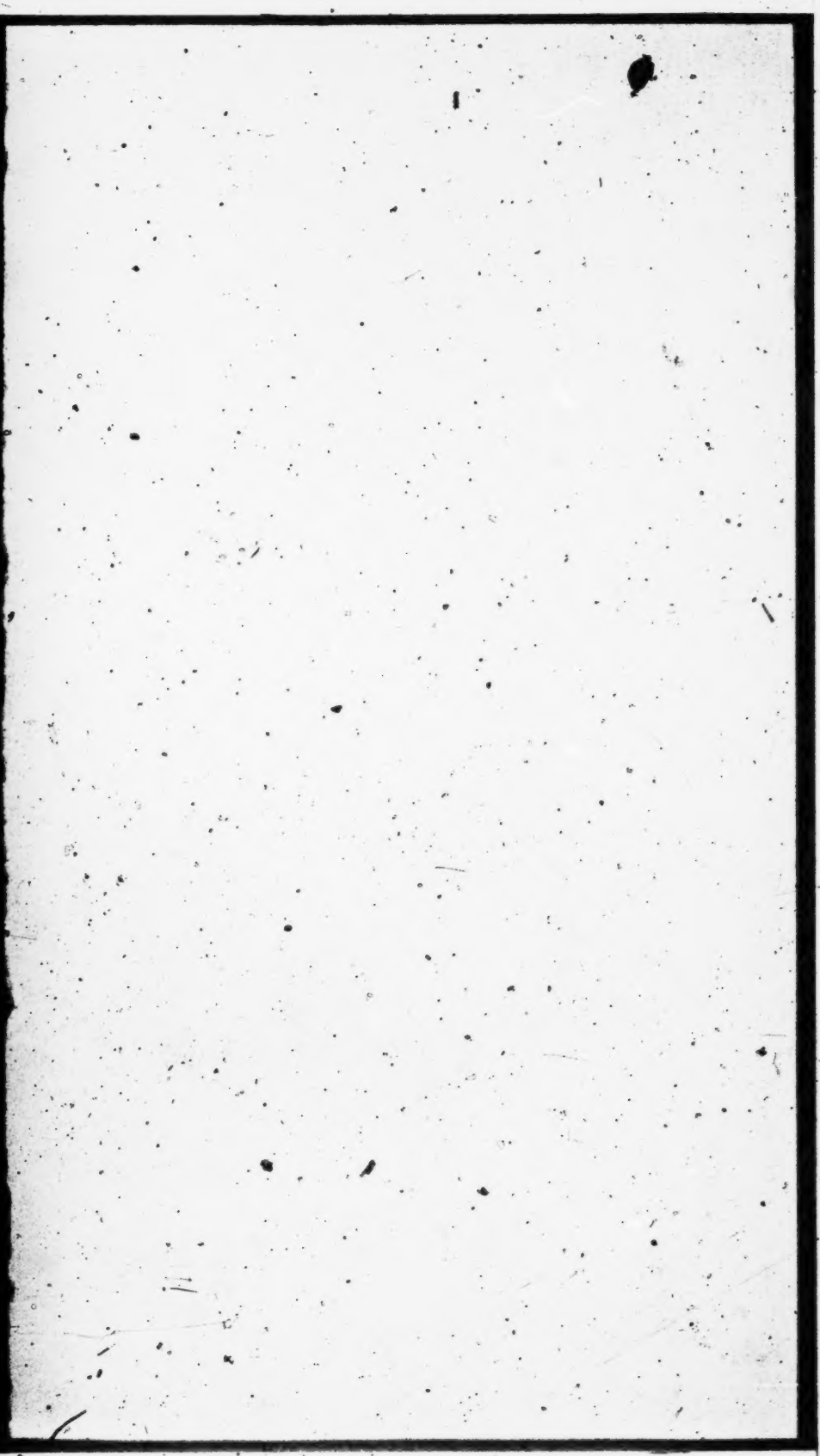
SEC. 5. Upon issuing such order the court may, upon the giving of security for any damages which the recusing witness may have suffered, should the charge be dismissed (except that no security shall be required of the United States), direct as a part of such order that the property of the recusing witness, at any place within the United States, or so much thereof in value as the court may direct shall be levied upon and seized by the marshal of said court in the manner provided by law or the rule of the court for a levy or seizure under execution, to be held to satisfy any judgment that may be rendered against such witness in the proceeding so instituted.

SEC. 6. The marshal, having made such levy, sha thereupon forward to the consul of any country where th recusing witness may be a copy of the order to show cau why such witness should not be adjudged guilty of co tempt with the request that said consul make service of th same personally upon the recusing witness, and shall cau to be published such order to show cause and for the seque tration of the property of such witness, in some newspap of general circulation in the district within which the cou issuing such order sits, once each week for six consecuti weeks.

SEC. 7. On the return day of such order or any lat day to which the hearing may by the court be continue proof shall be taken; and if the charge of recusan against the witness shall be sustained, the court sha adjudge him guilty of contempt and, notwithstanding a limitation upon the power of the court generally to puni for contempt, impose upon him a fine not exceeding $100,0 and direct that the amount thereof, with the costs of t proceeding, be satisfied, unless paid, by a sale of the pro erty of the witness so seized or levied upon, such sale to conducted upon the notice required and in the manner p vided for sales upon execution.

SEC. 8. Any judgment rendered pursuant to this A upon service by publication only may be opened for a swer within the time and in the manner provided in sect 57 of the Judicial Code.

Approved, July 3, 1926.



FILE COPY

DEC 26 19

In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 200. No. 201.

HARRY M. BLACKMER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

ON CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE UNITED STATES OF AMERICA, APPELLEE.

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In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 200. No. 201.

HARRY M. BLACKMER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

ON CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE UNITED STATES OF AMERICA, APPELLEE.

I. STATEMENT OF THE CASE.

The appellant, Harry M. Blackmer, a citizen of the United States, was tried in the Supreme Court of the District of Columbia in two cases, No. 16 (No. 5131 in the Court of Appeals and No. 200 in this Court) and No. 18 (No. 5132 in the Court of Appeals and No. 201 in this Court) for contempt in failing to respond to subpoenas issued out of said Court and directed to consuls of the United States in France to be served and which were served personally upon the appellant then residing in Paris. The subpoenas were issued and all proceedings herein were taken under the Act of July 3, 1926 (c. 762, 44 Stat. 835, U. S. C. Sup. IV, Title 28, Sections 711-718), commonly known as the Walsh Act. The cases were tried together before the late Mr.

Justice Siddons and the appellant was found guilty and sentenced to pay a fine of Thirty Thousand Dollars ($30,000.00) and costs in each case, aggregating Sixty Thousand Dollars ($60,000.00) and costs of both cases, to be satisfied out of property of the appellant then in the custody of the court.

Mr. Blackmer appealed to the Court of Appeals of the District of Columbia where the judgments were affirmed with an opinion for the court by Mr. Justice Robb, 49 F. 2d 523. (R. 200, page 88; R. 201, page 84.)

This Court allowed the petition of Mr. Blackmer for writs of certiorari, 52 S. Ct. 19.

We have been notified by counsel for the appellant that the appellant will rely upon the briefs filed in support of his petition for certiorari and will not file a further opening brief for the hearing on the merits. Therefore, when we refer to the briefs of the appellant we will abbreviate the designation of his brief in support of the petition for certiorari as "B" and his reply brief in support of the petition as "RB".

In the Court of Appeals the appellant raised several questions or points that are not included in his specification of errors (B. 19, 21) or in his summary of argument (B. 22, 23). In support of some of the points still insisted upon, the appellant advanced arguments in his brief in the Court of Appeals which are not advanced in his briefs here. We will have to assume that such questions, points and arguments need no reply from us.

To avoid repetition we ask that it be understood that all italicized matter in quotations is for our own emphasis.

A. WALSH ACT OF JULY 3, 1926.

Some of the points of the appellant (Point H (a—e), B. 23) question compliance of the procedure actually followed with the Walsh Act but in the trial court the appellant filed a motion in each case to vacate and set aside the order to show cause and in connection with the motion in case No. 16 (R. 200) filed a brief in which counsel for appellant said at page 4:

> "*The proceedings herein questioned, however, were all taken in exact pursuance of an Act of Congress,* purporting to validate them and enacted for the very purpose of validating such proceedings in this particular case against this particular respondent. *The question thus reduces itself to a consideration of the constitutionality of this legislation.*"

The Walsh Act, the Act of July 3, 1926 (c. 762, 44 Stat. 835, U. S. C. Sup. IV, Tit. 28, Sections 711, 718) is as follows:—

> "(Public No. 483—69th Congress) (S. 1035)—An Act Relating to contempts.
>
> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whenever letters rogatory shall issue out of any court of the United States, either with or without interrogatories addressed to any court of any foreign country, to take the testimony of any witness, being a citizen of the United States or domiciled therein, and such witness, having been personally notified by it according to the practice of such court, to appear and testify pursuant to such letters rogatory and such witness shall neglect to appear, or having appeared shall decline, refuse, or neglect to answer to any question which may be propounded to him by or under the authority of such court, to which he would be required to make answer were he being examined before the court issuing such letters, the court out of which said letters issued may upon proper showing order that a

subpoena issue addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the said court at a time and place therein designated.

"Sec. 2. Whenever the attendance at the trial of any criminal action of a witness, being a citizen of the United States or domiciled therein, who is beyond the jurisdiction of the United States, is desired by the Attorney General or any assistant or district attorney acting under him, the judge of the court before which such action is pending, or who is to sit in the trial of the same, may, upon proper showing, order that a subpoena issue, addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the said court at a time and place therein designated.

"Sec. 3. It shall be the duty of any consul of the United States within any country in which such witness may be at the request of the clerk of the court issuing any subpoena under this Act or at the request of the officer causing such subpoena to be issued, to serve the same personally upon such witness and also to serve any orders to show cause, rules, judgments, or decrees when requested by the court or United States marshal, and to make a return thereof to the court out of which the same issued, first tendering to the witness the amount of his necessary expenses in traveling to and from the place at which the court sits and his attendance thereon, which amount shall be determined by the judge on issuing the order for the subpoena and supplied to the consul making the service.

"Sec. 4. If the witness so served shall neglect or refuse to appear as in such subpoena directed, the court out of which it was issued shall, upon proof being made of the service and default, issue an order directing the witness to appear before the court at a time in such order designated to show cause why he should not be adjudged guilty of contempt and be punished accordingly.

"Sec. 5. Upon issuing such order the court may, upon the giving of security for any damages which the recusing witness may have suffered, should the charge be dismissed (except that no security shall be required of the United States), direct as a part of such order that the property of the recusing witness, at any place within the United States, or so much thereof in value as the court may direct shall be levied upon and seized by the marshal of said court in the manner provided by law or the rule of the court for a levy or seizure under execution, to be held to satisfy any judgment that may be rendered against such witness in the proceeding so instituted.

"Sec. 6. The marshal, having made such levy, shall thereupon forward to the consul of any country where the recusing witness may be a copy of the order to show cause why such witness should not be adjudged guilty of contempt with the request that said consul make service of the same personally upon the recusing witness, and shall cause to be published such order to show cause and for the sequestration of the property of such witness, in some newspaper of general circulation in the district within which the court issuing such order sits, once each week for six consecutive weeks.

"Sec. 7. On the return day of such order or any later day to which the hearing may by the court be continued, proof shall be taken; and if the charge of recusancy against the witness shall be sustained, the court shall adjudge him guilty of contempt and, notwithstanding any limitation upon the power of the court generally to punish for contempt, impose upon him a fine not exceeding $100,000 and direct that the amount thereof, with the costs of the proceeding, be satisfied, unless paid, by a sale of the property of the witness so seized or levied upon, such sale to be conducted upon the notice required and in the manner provided for sales upon execution.

"Sec. 8. Any judgment rendered pursuant to this Act upon service by publication only may be opened for answer within the time and in the manner provided in Section 57 of the Judicial Code.

"Approved, July 3, 1926."

B. THE PURPOSE OF THE ACT OF JULY 3, 1926.

Under the heading "History of the Act—Its Special Purpose" the appellant excerpts (B. 2) from remarks in the Senate and in the House of Representatives without suggesting a reason for referring to such remarks. Almost every statute is brought to pass by some particular problem or emergency. This was general legislation, notwithstanding the conduct of the appellant and another were primary inducements for the act.

This Court has said in the case of *Ex Parte McCardle*, 7 Wall. 506, (1868), at page 514:

> "We are not at liberty to inquire into the motives of the legislature."

We also cite:

State Board of Tax Com'rs of Indiana v. Jackson, 283 U. S. 527, 537 (1931) (preliminary print);

State of Arizona v. State of California, 283 U. S. 423, 455 (1931) (preliminary print).

The general purpose of an act as distinguished from the particular emergency that led to it may be helpful in the interpretation of a statute, especially in an effort to determine its constitutionality. For the convenience of the Court we will quote from the report of the Chairman of the Committee on the Judiciary of the House of Representatives to the House, (Report 1313, 69th Congress, First Session). It is said at pages 3 to 4 of the report:

> "It is believed that this bill, which is a general law, will be capable of enforcement by transferring the offense from contempt of a foreign court to one against our own court, providing for a lawful service of a subpoena upon the witness by United States consul, who under the amendment to the bill, is clearly authorized to make service. It will be noticed that the amendment leaves the remedy by letters rogatory the

same as it now is under existing law and only provides that in case of a recusancy the service of a subpoena will make the conduct of the witness an offense or a contempt of the order of the United States court, and thus amenable to its jurisdiction. Wherever a court can get jurisdiction of a person or one guilty of contempt, the procedure to punishment is simple. Here, however, the person can not be seized, as there is no treaty provision for the return of witnesses, only for the return of persons accused of crime. There is no way in which the court against whom the contempt is committed could administer punishment unless through the method provided for in the amendment to the bill, namely, by attachment and sequestration of any property of the recusant witness found within our jurisdiction. It is also provided not only that the subpoena shall be served personally upon the witness but also that the order to show cause why he should not be punished for contempt and his property sequestered, likewise, through the consul of the United States, will be served personally upon the recusant witness."

Then turning back in the report (pages 1 to 2) it is said:

"The bill as it passed the Senate was intended to meet this situation in civil cases. It failed, however, to give *the Government* any relief in criminal cases. This led to a conference with Hon. Atlee Pomerene, special counsel for the United States Government appointed by the President, with a view that the bill as it passed the Senate might be amended to include criminal cases. It is really more important that the Government have the benefit of testimony of important witnesses in criminal cases than even it is in civil cases."

The principal amendment to effectuate the purpose was the insertion of Section 2 of the Act as finally adopted.

C. PROCEDURE IN NO. 200.

On May 13, 1925, Harry F. Sinclair and Albert B. Fall were indicted in the Supreme Court of the District of Columbia, case No. 43,324, for conspiracy to defraud the United States in violation of Section 39 of the Criminal Code. Before May 13, 1927, the case had been assigned for trial on October 17, 1927.

On May 13, 1927, counsel representing the government filed their petition signed by them and sworn to by Owen J. Roberts praying for the issuance of subpoenas under the Walsh Act for appellant and another to attend the trial in Washington. The petition represented that the appellant was a citizen of the United States then or lately in France and gave the reasons of counsel for desiring this testimony. Counsel represented in the petition that they "believe and therefore aver that the attendance of" appellant "is vital and important to the United States" because of the facts which "counsel believe and therefore aver" appellant could give which would be material in connection with the establishment of the Sinclair-Fall conspiracy and of overt acts done therein and specified to what particular facts they referred. (R. 200, pages 1-3.)

The Court issued an order granting the subpoenas to be addressed to any consul of the United States in France for service and fixing $500.00 as the amount to be tendered appellant for traveling expenses. (R. 200, page 4.)

The subpoenas were issued in the usual form, from "the President of the United States to H. M. Blackmer" commanding him to attend said court on October 17, 1927, at 10:00 A. M. to testify on behalf of the United States. (R. 200, pages 7, 9.)

George Orr, Consul of the United States at Paris (R. 200, pages 73, 74; R. 201, page 59) served one subpoena personally upon the appellant on May 27, 1927, at his usual

place of residence in Paris, left the original subpoena with him and tendered him $500.00 for traveling expenses, which he refused. (R. 200, pages 8, 9.) On June 7, 1927, a similar subpoena was served by Raymond Davis, Consul of the United States at Paris (R. 200, pages 73, 74; R. 201, page 59) upon appellant personally at Paris by reading the subpoena to him and leaving a duplicate copy with him. He also tendered $500.00 in currency which tender was refused. (R. 201, pages 9, 10.)

The appellant was called as a witness on October 17, 1927, after the trial of said Sinclair-Fall conspiracy case had been commenced and he failed to respond. (R. 200, pages 45, 46.) Counsel representing him appeared for the purpose of explaining to the Court why he was not present and to state that he would not be present. (R. 200, pages 6, 11, 45, 46.)

On November 4, 1927, counsel for the government filed their petition for a rule in contempt, alleging in substance the citizenship of appellant, issuance and service of the subpoenas as aforesaid and the failure of the appellant to appear as a witness as aforesaid. (R. 200, pages 4, 11.) Pursuant thereto on November 16, 1927, the Court issued its order, referring to the petition for a citation in contempt, and directing the appellant to appear on January 6, 1928, to show cause why he should not be adjudged guilty of contempt and be punished accordingly; directed the seizure by the marshal of $100,000.00 of property of appellant; that the marshal forward a copy of the order to a consul for service upon appellant and that the order be published in a designated newspaper of general circulation in the District of Columbia once each week for six (6) consecutive weeks. (R. 200, pages 11, 12.) The $100,000.00 of property was seized by the marshal on November 19, 1927. (R. 200, page 12.) A copy of the order to show cause was delivered to the appellant at Paris on December 5,

1927, by Consul Orr. (R. 200, pages 12, 13.) The order to show cause was published as directed between November 19 and December 24, 1927, both inclusive. (R. 200, pages 14-16.)

On December 31, 1927, counsel for the appellant, appearing specially, moved to vacate the order to show cause on substantially the same grounds asserted in this Court as Points A to G, inclusive. (R. 200, pages 16, 17; B, pages 22, 23.) In support of the motion counsel filed an affidavit by Mr. Blackmer in which he admits his American citizenship. (R. 200, page 19.) After argument the motion was overruled with an opinion by the late Mr. Justice Siddons, March 21, 1928. (R. 200, pages 20-34.)

On September 9, 1929, counsel, appearing specially for the appellant filed an amended plea in his behalf in which detailed admissions or denials of the facts alleged in the petition for the order to show cause are made, including admission of receipt of the subpoena; rejection of the tender of traveling expenses; the attachment of his property and receipt of a copy of the order to show cause as hereinbefore stated. (R. 200, pages 43, 49.)

Trial was had on September 16 and September 17, 1929, the appellant being represented by counsel. (R. 200, page 72.) Mr. Battle testified that he had discussed the constitutionality of the Walsh Act with appellant at Paris "in the summer of 1927, just after these subpoenas had been served on Blackmer:" (R. 200, page 77.) Mr. Blackmer understood or was given to understand the terms and penalties of the Walsh Act. (R. 200, page 81.)

The decree of the trial court entered October 19, 1929, adjudging appellant in contempt directs the fine of $30,000.00 and costs shall be satisfied out of the property theretofore in the custody of the marshal. (R. 200, pages 65, 66.)

D. PROCEDURE IN NO. 201.

The Sinclair-Fall conspiracy case had proceeded until a mistrial was declared (R. 200, pages 50, 75) on November 2, 1927, for the reasons considered by this Court in the case of *Sinclair v. United States*, 279 U. S. 749 (1929). Before January 9, 1928, the case had been re-assigned for trial on April 2, 1928. (R. 201, page 2.)

On January 9, 1928, government counsel petitioned the Court for an order to issue subpoenas for Blackmer and another citizen of the United States then in France, to appear at the trial on April 2, 1928. The petition this time was sworn to by Atlee Pomerene. It was in the same form and substance as the petition for the subpoenas involved in case No. 200, *supra*. (R. 201, pages 1-3.)

On the same day the Court ordered the subpoenas to be issued as prayed for, again fixing $500.00 as the amount to be tendered for traveling expenses. (R. 201, pages 3-4.) The subpoenas that were issued again were in the traditional form aforesaid but in this case we will emphasize the language of the subpoenas in both cases that the witnesses appear on the specific date "and not depart the Court without leave of the Court or District Attorney." (R. 201, page 4.) A subpoena was served by Consul Orr (R. 201, page 59) on February 1, 1928, personally upon the appellant by exhibiting the subpoena to him, reading it and leaving a copy with him at Paris. At the same time $500.00 in currency was tendered to the appellant and the tender was refused by him. (R. 201, page 5.)

Due to the ill health of Mr. Fall a severance in the Sinclair-Fall conspiracy case was ordered on March 22, 1928, with the case to proceed against Mr. Sinclair. To permit the deposition of Mr. Fall to be taken on behalf of Mr. Sinclair the Court continued the case for two (2) days, until April 4th. On April 3rd counsel had not returned

from taking Mr. Fall's deposition. The deposition was lengthy and had not been typed and Good Friday was about to be reached so the Court adjourned the opening of the trial until April 9th. (R. 201, page 63.)

On April 9, 1928, the trial of Mr. Sinclair for criminal conspiracy in said case No. 43,324 commenced and the appellant was called as a witness and did not respond. (R. 201, pages 7, 26, 27.)

On July 6, 1928, counsel for the government presented their petition to the Court for rule to show cause, reciting the facts hereinabove given under this heading, except the reasons for the continuance of the trial from April 2 to April 9, 1928, were omitted. Otherwise in form and substance the petition was the same as in case No. 200. (R. 201, pages 5-8.)

On the same day the Court ordered "upon the motion of the United States" the appellant to appear on October 15, 1928, to show cause why he should not be adjudged in contempt of Court for failing to obey the subpoena served upon him in the said Sinclair-Fall conspiracy case "the circumstances of which are very fully set out in said motion of plaintiff filed herein." Otherwise the order is in form and substance substantially the same as in case No. 200. (R. 201, pages 9-10.) The Court's order not having been executed, an alias order was obtained on December 26, 1928. (R. 201, pages 11-12.)

Pursuant to the alias order to show cause, on January 7, 1929, the marshal levied upon the same property of the appellant then in his custody. (R. 201, pages 12-14.) Publication of the order was made on January 8 to February 12, 1929. (R. 201, pages 12-14.) A copy of the order was served on the appellant personally by Consul Orr at Paris on January 21, 1929. (R. 201, page 14.)

On February 25, 1929, counsel for the appellant, appearing specially, moved to vacate the alias order for the same reasons aforesaid in support of his motion to vacate the order in case No. 200, still relying upon the affidavit of appellant in which he admits his citizenship. (R. 201, pages 15-19.) The motion was overruled. (R. 201, page 21.)

On September 9, 1929, counsel for the appellant filed pleas in his behalf in which the specific allegations of the petition for the order to show cause are admitted or denied, including admission that the subpoena to appear on April 2, 1928, had been personally served upon him at Paris and that he had rejected the tender of $500.00 and that he, when called as a witness on April 9, 1928 "did not respond to said call and did not appear." (R. 201, pages 21, 23, 24, 26, 27.) He also admits receipt of the order to show cause and knowledge that his property had been seized by the marshal. (R. 201, pages 29, 30.)

As aforesaid this case was tried on September 16th and 17th, 1929, together with case No. 200 and the same testimony of Mr. Battle with respect to his consultation with the appellant as to the constitutionality of the Walsh Act given in our foregoing outline of the procedure of case No. 200 appears in the record of this case, No. 201 at pages 70 *et seq.*

The decree adjudging the appellant guilty of contempt, fining him $30,000.00 and costs and directing satisfaction out of the property in the custody of the marshal was entered on October 18, 1929. (R. 201, 49, 50.)

II. THE CONSTITUTIONALITY OF A STATUTE WILL BE PRESUMED.

This is a new type of legislation, so far as the procuring of testimony is concerned, and for the convenience of the Court, in support of our heading, we refer to the authorities given in the opinion of the Court of Appeals. (R. 200, pages 94, 95.)

Mr. Justice Siddons said (R. 5131, page 60):

> "We have before us in this case an unusual piece of legislation, unusual in the sense that, so far as we know, it has no analogous precedent in our legislative history; but that would not make it unconstitutional. It would be a sorry day for us, I think, when new conditions, new problems that occur out of our ever-changing and ever more complicated social order do not require new exercise of powers that we ought to consider, if we can, are within the constitutional competency of that branch of the government that may be undertaking to act in a given case."

Not only "every possible presumption is in favor of the validity of a statute" (*Sinking Fund Cases*, 99 U. S. 700, 718) (1878) and not only should legislative enactments be enforced "as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution" (*Atkin v. Kansas*, 191 U. S. 207, 223) (1903) but a statute will be interpreted:

> "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts on that score." (*United States v. La Franca*, 282 U. S. 568, 574) (1931).

The court may also want to refer to:

Fletcher v. Peck, 6 Cranch *87, *128 (1810);
Ogden v. Saunders, 12 Wheat. *213, *270 (1827);
Briscoe v. Bank of Kentucky, 8 Pet. 118, 122 (1834);
Railway Co. v. Wellman, 143 U. S. 339, 345 (1892);
Brown v. Walker, 161 U. S. 591, 596 (1896).

III. THE EXTRA-TERRITORIAL SERVICE OF THE SUBPOENAS BY THE CONSULS CREATED AN OBLIGATION TO RESPOND AND DID NOT VIOLATE THE DUE PROCESS GRANTED BY THE FIFTH AMENDMENT. (ANSWERING APPELLANT'S POINT A.)

Appellant's point A is that (a) the United States has no power to authorize the service of a subpoena within another country, and, (b) by a consul of the United States unless conferred by a treaty.

A. ANALYSIS OF THE QUESTION.

In the applications for the issuance of the subpoenas and in the petitions for the orders to show cause the government alleged that the appellant is a citizen of the United States and he admits his citizenship. Although the Walsh Act authorizes the subpoenaing of aliens domiciled in the United States temporarily abroad the validity of such provision need not be considered in this case. The government alleged that the appellant was domiciled in the United States but made no effort to prove the fact and the allegation may be regarded as surplusage.

We understand the appellant concedes that a citizen of the United States owes a duty of allegiance which goes with the citizen even unto the uttermost parts of the world and because of the duty of the citizen the United States has the power and right to recall its absent citizen but that the United States cannot exercise that power and right by conveying notice of the recall through a messenger who will have to walk on foreign soil in order to deliver the notice unless there is a treaty with the countries through which the messenger must pass, and, especially that a consul cannot be the messenger without such treaties. (B. 24-30; RB. 5-25.)

In appellant's reply brief, page 6, it is said:

> "(5) It may be conceded that the act in question is unconstitutional without it following that a valid law could not be enacted which would serve the same purpose even more efficiently. If the authors of the act * * * had instead paid more attention to the decisions of this Court a way would have opened."

Although the appellant did not express the way a citizen could be validly recalled from abroad his analysis of this Court's decision in *McDonald v. Mabee,* 243 U. S. 90 (1917), (abstracted *infra*), at page 10 of his reply brief, justifies the inference that appellant considers the power of recall could be validly exercised by serving the notice of recall at the citizen's last place of residence within the United States. If he has in mind the holding of this Court in *Luria v. United States,* 231 U. S. 9, 20, 24 (1913), (abstracted *infra*) then his quoted statement justifies the inference that mere publication within the United States of the recall would be a valid exercise of the power and right. The theory upon which substituted and constructive service of a process or notice is held valid, as appears in the cases to which we will refer, is that the substituted means is reasonably calculated to result in actual notice to the person to whom directed. Therefore, the effect of the concession of appellant is that it is proper and valid for the United States to get notice to the citizen abroad that he has been recalled and that such notice *per se* is not an invasion of foreign sovereignty or of the alleged right of asylum of the citizen in the foreign sovereignty.

If in making the quoted statement appellant had in mind the cases sustaining the validity of service by mail, then the inference is that it is proper for the United States to give notice necessary for due process through the agency of the mail carriers of other sovereigns. The principle of the concession would sustain the validity of service by tele-

phone, providing the United States officer were careful to be upon United States soil when he got the connection with the absent citizen. Or, presumably the Congress could have validly provided for service by radio if there were proof that the absent citizen heard the radio message.

But in no event, says the appellant, can an officer of the United States carry the same information, or let us for the moment call it a command, as the appellant insists, upon foreign soil and deliver it to the absent citizen. Again this is not because of the command or the substance of the message, for admittedly it is proper to bring such command or message to the attention of the absent citizen in the substituted ways we have mentioned. The objection is solely that an officer or messenger of the United States has to use the public streets or public carriers or those holding themselves out to carry people for hire in the foreign country in order to get to the absent citizen. It is not an offense, says the appellant in effect, to the sovereignty of the foreign country or to the asylum of our citizen therein to get the command or notice to our citizen but it must be done through a fiction rather than directly. Appellant's position is that no treaty is necessary for the fiction but a treaty is necessary for the consul to walk peacefully upon the streets of Paris when about to serve the command or notice!

The appellant's admission of a citizen's duty of allegiance and of the power of his sovereign to recall him, necessarily implies whatever "jurisdiction *in personam*" is required. The duty of allegiance as a basis for jurisdiction *in personam* is sound in reason and supported by the great weight of authority. It is indirectly supported by the decisions of this Court hereinafter to be noted. It is a much more fundamental basis for jurisdiction than implied, or even express, consent and implied consent is an established basis for jurisdiction *in personam*. (*Hess v. Pawloski*, 274 U. S. 352, (1927) and *Wuchter v. Pizzutti*,

276 U. S. 13, (1928) both abstracted, *infra*.) It is an inherently necessary basis to make the power of recall effective and the benefits of citizenship complete.

Jurisdiction that is defective under our Constitution for want of proper service of process or notice must be distinguished from lack of jurisdiction of the person, or, we think more properly called, personal relations, of the citizen. After the Walsh Act, the court had jurisdiction of the personal relations, or person, of the appellant to the extent of the Act, but, until notice were given that the court intended to exercise such jurisdiction, the court lacked jurisdiction in the sense of being authorized under the Constitution to proceed against the appellant. When jurisdiction of the personal relations exists and has been acted upon, then the initial process that follows, subpoena or summons, whatever its form even as a "command", is, as in implied consent cases (*Wuchter v. Puzzutti, infra*), in *quasi in rem* proceedings (*Security Savings Bank v. California,* 263 U. S. 282, *infra*), and in contempt cases (*Cooke v. United States,* 267 U. S. 517, *infra*), in essential nature and purpose and function a mere "notice". When it is said that the court "*acquires*" jurisdiction by its process, subpoena or summons, the expression relates to the necessity of notice to comply with "due process", unless there was no jurisdiction of a personal relation, inherently or by consent, or of a *res in custodia legis,* in which case it may be said that jurisdiction is "acquired" by the service of the process.

There can be no question but that the Walsh Act provides for such notice as satisfies the "due process" required by the Fifth Amendment of the Constitution.

Thus the principal questions in this case, as narrowed by the appellant, are whether allegiance was a sufficient basis for the subpoena recalling the appellant and whether international law requires consent by treaty of a foreign

sovereign before a messenger of the United States may peacefully use the public highways and conveyances of the foreign sovereignty. It would seem unnecessary, in view of the appellant's concession for us to refer to the authorities concerning the duty of allegiance by a citizen; the right of his sovereign to recall him; the nature of the temporary allegiance owed by the absent citizen to the sovereign of his place of residence and the extent of the interest of the sovereign in what the sovereign of permanent allegiance does with respect to its citizens but we think that relationship between sovereign and citizen is the basis of the power and right of the sovereign to recall its citizen and that the only interest of the foreign sovereign in its alien resident is to see that no act of the sovereign of allegiance towards its citizen creates a breach of the peace or reflects upon the equality, independence or dignity of the sovereign of residence. Therefore, we will briefly call attention to the authorities upon the extra-territorial rights of a sovereign.

The peaceful personal service upon a citizen in a foreign land by an officer of the United States is not contrary to international law. Even if it were contrary to international law, the courts of the United States would be bound to follow and enforce the Walsh Act as the law of this country, binding upon them, unless the act in itself is contrary to some provision of the Constitution. Since the United States, under the Constitution has jurisdiction to recall a citizen, the manner or procedure laid down by the Congress for accomplishing the recall is the supreme law of the land (Constitution, Article VI), unless, as aforesaid, it violates some prohibition of the Constitution. So far as "due process" is concerned, the Court will merely pass upon the fact as to whether such notice (direct and positive personal notice) and the means of compliance therewith (tender of necessary traveling expenses), comport with natural justice. That such is the case is so clear that it is not debated by the appellant.

B. EVERY CITIZEN OWES THE DUTY OF ALLEGIANCE TO THE UNITED STATES.

Carlisle v. United States, 16 Wall. 147 (1872), opinion by Mr. Justice Field, at page 154:

> "By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign. The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence."

Minor v. Happersett, 21 Wall. 162 (1874), opinion by Chief Justice Waite, at pages 165-166:

> "There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. *He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection reciprocal obligations.* The one is a compensation for the other; allegiance for protection and protection for allegiance."

Luria v. United States, 231 U. S. 9 (1913), opinion by Mr. Justice Van Devanter, at page 22:

> "Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other."

Miller (an Associate Justice of the Supreme Court of the United States) *on the Constitution of the United States,* at pages 294-295:

> "The citizen owes an allegiance to the United States, and he owes an allegiance to his State. He is bound to obey the laws of his State, and he is bound to refrain from all criminal practices denounced by those laws. * * * He is bound to be governed by the United States in all of his relations with foreign states. * * * It is the business of a lifetime to define the relations of a man to that Government, or his relations to the State in which he belongs; but they all grow out of, and constitute this doctrine of allegiance and protection."

Such a fundamental concept of international law would seem to carry with it the implied and tacit consent of nations that the obligation may be made effective in any inoffensive way and we will show that the inference has been actually recognized.

C. THE UNITED STATES HAS EXTRA-TERRITORIAL JURISDICTION OVER ITS CITIZENS.

1. General Authorities.

Rose v. Himely, 4 Cranch 241 (1808), opinion by Chief Justice Marshall, at page 279:

> "It is conceded, that the legislation of every country is territorial; *that beyond its own territory, it can only affect its own subjects or citizens.*"

The Appollon, 9 Wheat. 362 (1824), opinion by Mr. Justice Story, at page 370:

> "The laws of no nation can justly extend beyond its own territories, *except so far as its own citizens.* They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction."

See also *The Resolution,* 2 Dallas 1 (1781) *per curiam* opinion, page 4.

Willoughby on the Constitution, at page 247, Section 120:

> "From the viewpoint of international relations, as we have just seen, the law of one State is not permitted by other States to *operate* outside of the territorial limits of the State which promulgates it, and, therefore, though claiming a legal authority over an individual outside of such limits, a State will not be permitted by other States *to exercise it against the consent* of the State within whose limits the individual is situated. But that does not render impossible *the existence of or invalidate* such a claim, for when, if ever, such an individual is apprehended within the territory of the State claiming authority over him he may be held responsible for acts committed while abroad. And also, as still more plainly showing the personal and non-territorial character of allegiance and sovereignty is the principle universally recognized both in municipal and international law, that a citizen of a State is in many cases entitled to the protection of that State while abroad. Thus he does not in any way lose his citizenship by departing from the territorial limits of the State of which he is a member, nor does he escape from beneath its law or cease to be entitled to its protection."

Section 121, page 248:

> "In the preceding section it has been shown that a State has absolute legal authority over all persons within its territorial jurisdiction, *and over its own citizens wherever they may be.*"

Moore: International Law Digest, Volume II, pages 255, 256:

> "'Taking up theories classified as non-territorial, we may first notice that which proposes the punishment by the State of its own citizens for acts done abroad.

" 'This theory has been separated into three subdivisions; as follows:

(a) The punishment by the State of all acts of its citizens abroad, which, if committed within its territory, would constitute violations of its criminal law. This proposition makes the penal law of the State a personal statute binding upon its citizens everywhere.

(b) The punishment by the State of all acts of its citizens which may be committed in particular places, and which, if committed within its territory, would constitute violations of its criminal law.

(c) The punishment by the State of particular acts of its citizens abroad, which, if committed within its territory, would constitute violations of its criminal law, and which, by reason of their gravity, or the fact that, as is the case with political crimes, the foreign State may not punish them, it is the duty of the State, not only to mankind, but to itself, to punish.

" 'It is not to be doubted that each state may, in the exercise of its sovereignty, punish its own citizens for such acts and in such manner as it may deem proper.' "

Charles Cheney Hyde: International Law, Volume I, page 424, paragraph 240:

"It is generally agreed that a State may punish its own nationals for disobeying its commands while within a foreign country, notwithstanding the legal quality which the territorial sovereign may have annexed to the acts of disobedience. The unwillingness of the former to respect and yield to the law of the latter is a matter with which no foreign power has the right to interfere."

In *Columbia Law Review*, Vol. 27, pages 204 to 210 the Walsh Act is discussed and it is said at page 206:

> "While under the territorial organization of modern political society the law of a given country can be enforced only within its territorial limits, this does not mean that the law of that country cannot affect the legal relations of persons outside its limits. Law is not something material which spreads out until it reaches a territorial boundary and then stops."
>
> (Citing *Cook, The Logical and Legal Bases of the Conflict of Laws*, 33 Yale Law Journal 457, 482-484.)
>
> (See also *United States v. Bennett*, 232 U. S., *infra*.)

2. A non-resident citizen may be taxed upon income from property not in the United States.

The United States by the Revenue Act of 1921, Section 210 (42 Stat. 227, 233) taxes non-resident citizens upon their income from sources not even in the territorial domain of the United States and this Court holds such taxation a constitutional exercise of sovereign jurisdiction.

Cook v. Tait, 265 U. S. 47 (1924).

Cook sued Tait, a Collector of Internal Revenue, to recover $298.34 of an income tax paid under duress. Cook was a native citizen of the United States, domiciled in Mexico. Upon demand, but under protest, he made a return of his income from property situated in Mexico. Judgment dismissing the action on demurrer was affirmed. The contention made was, (Opinion, page 54):

> "Plaintiff assigns against the power not only his rights under the Constitution of the United States but under international law, and in support of the assignments cites many cases. It will be observed that the foundation of the assignments is the fact that the citizen receiving the income, and the property of which it is the product, are outside of the ter-

ritorial limits of the United States. These two facts, the contention is, exclude the existence of the power to tax. Or to put the contention another way, as to the existence of the power and its exercise, the person receiving the income, and the property from which he receives it must both be within the territorial limits of the United States to be within the taxing power of the United States. The contention is not justified, and that it is not justified is the necessary deduction of recent cases."

In neither the cases cited in *Cook v. Tait*, nor in that case, do the opinions elaborate the extraterritorial jurisdiction of the United States over its citizens, but in the opinion of Mr. Justice McKenna, to which there was no dissent, the holding is unambiguous. At page 56 of the opinion:

"The contention was rejected that a citizen's property without the limits of the United States derives no benefit from the United States. The contention, it was said, came from the confusion of thought in 'mistaking the scope and extent of the sovereign power of the United States as a nation and its relations to its citizens and their relations to it.' And that power in its scope and extent, it was decided, is based on the presumption that government by its very nature benefits the citizen and his property wherever found, and that opposition to it holds on to citizenship while it 'belittles and destroys its advantages and blessings by denying the possession by government of an essential power required to make citizenship completely beneficial.' *In other words, the principle was declared that the government, by its very nature, benefits the citizen and his property wherever found and, therefore, has the power to make the benefit complete.* Or to express it another way, the basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or out of the United States, and was not and cannot be made dependent upon the domicile of the citizen, that being in

or out of the United States, but upon his relation as citizen to the United States and the relation of the latter to him as citizen. *The consequence of the relations is that the native citizen who is taxed may have domicile, and the property from which his income is derived may have situs, in a foreign country and the tax be legal—the government having power to impose the tax.*"

Dealing with a similar subject matter this Court held in *United States v. Bennett*, 232 U. S. 299 (1914), that property of a citizen kept outside of the territorial limits of the United States was taxable by the United States for the reason that no imaginary barrier shuts the government off from exercising the powers which inherently belong to it by virtue of its sovereignty.

In these cases the law itself is the command which operates upon the citizen even though in a foreign land. He requires no notice of the command other than the constructive notice with which he is chargeable. The situation in the case at bar is different only because the application of the law is made to depend upon an extraneous event, the happening of which due process requires be brought to the attention of the citizen.

3. Citizens are punishable in the United States for offences committed in foreign countries.

Citizens are punishable in the United States for violation of the laws of the United States provided they were intended to have extra-territorial effect for the reason that such laws are a command to the citizen not to do the forbidden act. This command is taken with the citizen wherever he goes. He does not violate international law in taking the command with himself. No more is the command of the court, pursuant to authority from Congress, made in the United States, an "offense to the dignity or

right of sovereignty of" the foreign sovereign. (*Bowman* case immediately *infra.*)

United States v. Bowman, 260 U. S. 94 (1922).

The defendant in error was indicted under Section 35 of the Criminal Code for a conspiracy to defraud the United States Shipping Board, Emergency Fleet Corporation, in which the United States was a stockholder. The defendant in error and his associates conspired on the high seas for the delivery at Rio de Janeiro by the Standard Oil Company of 600 tons of oil and to charge the Fleet Corporation for 1,000 tons, and then to divide the money paid for the undelivered 400 tons among the defendant in error and his associates. Upon arrival at Rio de Janeiro 600 tons of oil was actually delivered but payment was collected from the Fleet Corporation for 1,000 tons of oil. A demurrer to the indictment was filed upon the ground of lack of jurisdiction because the crime was committed on the high seas or within the jurisdiction of Brazil. The demurrer was sustained and the indictment was quashed. In reversing the judgment of the District Court with directions to overrule the demurrer and for further proceedings, Mr. Chief Justice Taft discussed the extraterritorial jurisdiction of the United States as follows (pp. 98-100):

> "But the same rule of interpretation should not be applied to criminal statutes which are, as a class, *not logically dependent on their locality for the Government's jurisdiction,* but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents. *Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large im-*

munity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense. Many of these occur in c. 4, which bears the title 'Offenses against the operations of the Government.' Section 70 of that chapter punishes whoever as consul knowingly certifies a false invoice. Clearly the locus of this crime as intended by Congress is in a foreign country and certainly the foreign country in which he discharges his official duty could not object to the trial in a United States court of a United States consul for crime of this sort committed within its borders. Forging or altering ship's papers is made a crime by Sec. 72 of c. 4. It would be going too far to say that because Congress does not fix any locus it intended to exclude the high seas in respect of this crime. The natural inference from the character of the offense is that the sea would be a probable place for its commission. Section 42 of c. 4 punishes enticing desertions from the naval service. Is it possible that Congress did not intend by this to include such enticing done aboard ship on the high seas or in a foreign port, where it would be most likely to be done? Section 39 punishes bribing a United States officer of the civil, military or naval service to violate his duty or to aid in committing a fraud on the United States. It is hardly reasonable to construe this not to include such offenses when the bribe is offered to a consul, ambassador, an army or a naval officer in a foreign country or on the high seas, whose duties are being performed there and when his connivance at such fraud must occur there. So, too, Sec. 38 of c. 4 punishes the wilfully doing or aiding to do any act relating to the bringing in, custody, sale or other disposition of property captured as prize, with intent to defraud, delay or injure the United States or any captor or claimant of such property. This would naturally often occur at sea, and Congress could not

have meant to confine it to the land of the United States. Again, in Sec. 36 of c. 4, it is made a crime to steal, embezzle, or knowingly apply to his own use ordnance, arms, ammunition, clothing, subsistence, stores, money or other property of the United States furnished or to be used for military or naval service. It would hardly be reasonable to hold that if any one, certainly if a citizen of the United States, were to steal or embezzle such property which may properly and lawfully be in the custody of army or naval officers either in foreign countries, in foreign ports or on the high seas, it would not be in such places an offense which Congress intended to punish by this section." * * *

Page 102:

"* * * We can not suppose that when Congress enacted the statute or amended it, it did not have in mind that a wide field for such frauds upon the Government was in private and public vessels of the United States on the high seas and in foreign ports and beyond the land jurisdiction of the United States, and therefore intended to include them in the section."

* * * * *

"* * * The three defendants who were found in New York were citizens of the United States and were certainly subject to such laws as it might pass to protect itself and its property. *Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the government to which they owe allegiance.* * * *"

If then the Congress of the United States can make an act committed by an American citizen in a foreign country, or on the high sea, criminal, as pointed out by the learned Chief Justice Taft in *United States v. Bowman, supra,* and if having committed this offense a United States citizen can be brought to trial in the federal courts within the bounds of the United States, as he likewise points out, it is hard to conceive any sound reason why a witness, who

is a citizen of the United States residing abroad, served with a subpoena, issued by the court under the authority of the Congress can refuse to obey its commands without being in contempt.

If we limit the jurisdiction of our courts in contempt proceedings, to those who are served with process within the United States and make no provision to compel attendance of those beyond the bounds of the United States, to borrow a thought from Chief Justice Taft in the case just cited, we make immune contempts of court which are as easily committed beyond as within the bounds of the United States.

The appellant's attempt to show inapplicability of the *Bowman* case (RB. 22-23) only serves to emphasize its applicability. He argues that in the *Bowman* case punishment was in the United States and that inferentially, it holds that—

> "No officer can put his foot on foreign soil to arrest the offender without the consent of the foreign nation, * * *."

The Walsh Act nowhere contemplates invasion of foreign soil to arrest the witness. This discloses the fundamental error in the reasoning of the appellant. He confuses the extra-territorial jurisdiction of a sovereign over its citizens while abroad with the extent of the power to enforce such jurisdiction. The jurisdiction is complete but it should not be exercised extra-territorially in any way that offends the dignity or independence of the nation where the citizen is found.

D. THE UNITED STATES HAS THE RIGHT TO RECALL ITS CITIZENS FROM ABROAD.

1. Independent Nations Generally Have the Right to Recall Their Citizens.

It follows from the obligation and duty of allegiance of a citizen to his country and from the extra-territorial power to legislate with respect to the relations of nationals to their sovereign, that citizens may be recalled from abroad.

The power was exercised by England as recorded in cases as early as the sixteenth century. (*Bartue and Duchess of Suffolk* (1559) 2 Dyer's Reports 176-b, 73 Eng. Rep. full reprint 388; *Knowles v. Luce* (1579) Moore 109, 72 Eng. Rep. full reprint 473, both abstracted *infra*.)

Vattel, "The Law of Nations," 1853 Edition, page 105:

> "In a time of peace and tranquility, when the country has no actual need of all her children, the very welfare of the State, and that of the citizens, requires that every individual be at liberty to travel on business, *provided that he be always ready to return, whenever the public interest recalls him.* It is not presumed that any man has bound himself to the society of which he is a member, by an engagement never to leave the country when the interest of his affairs requires it, and *when he can absent himself without injury to his country.*"

Again at page 172, *Vattel* states:

> "In virtue of this submission, foreigners who commit faults are to be punished according to the laws of the country. The object of punishment is to cause the laws to be respected, and to maintain order and safety."

Page 173:

> "From a sense of gratitude for the protection granted to him, and the other advantages he enjoys, the

foreigner ought not to content himself with barely respecting the laws of the country; he ought to assist it upon occasion, and contribute to its defense, as far as is consistent with his duty as a citizen of another state. * * *"

"He cannot, indeed, be subject to those burdens that have only a relation to the quality of citizens; but he ought to bear his share of all others."

Page 174:

"The citizen or the subject of a state who absents himself for a time without any intention to abandon the society of which he is a member, does not lose his privilege by his absence; he preserves his rights, *and remains bound by the same obligations.* * * *"

"The state, which ought to respect the rights of other nations, and in general those of all mankind, cannot arrogate to herself any power over the person of a foreigner, who, though he has entered her territory, has not become her subject. The foreigner cannot pretend to enjoy the liberty of living in the country without respecting the laws; if he violates them, he is punishable as a disturber of the public peace, and guilty of a crime against the society in which he lives; but he is not obliged to submit, like the subjects, to all the commands of the sovereign. * * *"

The power and right of a nation to recall its nationals for military service is ancient and well recognized. In *Hyde on International Law,* Vol. 1, it is said at page 668:

"For the failure to respond to a call to arms after emigration or prior to naturalization, the sovereign may, not unreasonably, penalize its disobedient nonresident national by depriving him, should its law so provide, of civil or other rights or of property within its control."

The refusal to return to give testimony may result in greater disaster to a nation than failure to return to bear arms. Comparatively few citizens are abroad at any one

time. Their loss to an army may be inconsequential. They may be easily replaced by others. But vast interests of a nation may turn upon the testimony of a single individual. If that individual owes a duty to give his testimony to his country, he should not question his recall. He should not be permitted to cross an imaginary or physical boundary line and scoff at his government in need. What right has he to expect his country, so treated, to protect him abroad, or to protect his property at home?

It is said in *Blair v. United States*, 250 U. S. 273 (1919) at page 281:

> "The giving of testimony and the attendance upon court or grand jury in order to testify, are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned."

2. The United States is Not Less Favored by Reason of Its Constitution Than Other Nations in Respect to the Right to Recall Citizens.

The Constitution, Article I, Section 8, authorizes the Congress "to regulate commerce with foreign nations, * * *." Travel of citizens abroad is a form of commerce with foreign nations. The same section authorizes the Congress "to constitute tribunals inferior to the Supreme Court"; "to raise and support armies, * * *"; "and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

The Fourteenth Amendment provides in Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. * * *"

Section 5 of said amendment provides:

> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article."

There is no prohibition in the Constitution of the right of the Congress to provide by law for the recall of citizens from abroad when considered necessary.

In *Everard's Breweries v. Day*, 265 U. S. 545 (1924), it is said in the opinion of this Court, pages 558-559:

> "The Constitution confers upon Congress the power to make all laws necessary and proper for carrying into execution all powers that are vested in it. Art. I, Sec. 8, Cl. 18. In the exercise of such non-enumerated, or 'implied' powers it has long been settled that Congress is not limited to such measures as are indispensably necessary to give effect to its express powers, but in the exercise of its discretion as to the means of carrying them into execution may adopt any means appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution. *United States v. Fisher*, 2 Cranch, 358, 395; *Martin v. Hunter's Lessee*, 1 Wheat. 304, 326; *McCulloch v. Maryland, supra*, pp. 421, 422; *Ex parte Curtis*, 106 U. S. 371, 372; *Legal Tender Case* 110 U. S. 421, 440; *In re Rapier*, 143 U. S. 110, 134; *Logan v. United States*, 144 U. S. 263, 283; *Fong Yue Ting v. United States*, 149 U. S. 698, 712; *Lottery Case, supra*, p. 355; *Hoke v. United States*, 227 U. S. 308, 323."

In *McGrain v. Daugherty*, 273 U. S. 135 (1927), the 8th paragraph of the syllabus is:

> "The two houses of Congress in their separate relations have not only such powers as are expressly granted them by the Constitution, but also such auxiliary powers as are necessary and appropriate to make the express powers effective, but neither is invested with 'general' power to inquire into private affairs and compel disclosures."

The recall of a citizen to bear arms is appropriate for carrying into execution the power of the Congress to raise and support armies. Likewise, the recall of a citizen for the purpose of giving testimony in a case pending in court, is appropriate to the power of the Congress to constitute tribunals inferior to the Supreme Court. The recall of a citizen is appropriate to the carrying into execution of the ancient common law duties of citizens and the regulation of commerce with foreign nations.

The power to recall citizens was recognized by the framers of our Constitution as inhering in the legislative branch of our government. Mr. Justice McReynolds gives that history in his dissenting opinion in *Myers, Administratrix, v. United States,* 272 U. S. 52 (1926) at page 235 as follows:

> "Perhaps, the best statement concerning 'executive power' known in 1787 was by Mr. Jefferson in his Draft of a Fundamental Constitution for the Commonwealth of Virginia, proposed in 1783 (Writings, Ford's ed. 1894, vol. 3, 155-156):
>
> 'The executive powers shall be exercised by a Governor, who shall be chosen by joint ballot of both Houses of Assembly * * *. By executive powers, we mean no reference to those powers exercised under our former government by the crown as of its prerogative, nor that these shall be the standard of what may or may not be deemed the rightful powers of the Governor. We give them those powers only, which are necessary to execute the laws (and administer the government), and which are not in their nature either legislative or judiciary. The application of this idea must be left to reason. We do, however, expressly deny him the prerogative powers of erecting courts, offices, boroughs, corporations, fairs, markets, ports, beacons, lighthouses, and sea marks; of laying embargoes, of establishing precedence, of retaining within the State, or *recalling to it any citizen thereof,* and of making denizens, *except*

so far as he may be authorized from time to time by the legislature to exercise any of those powers.'

"This document was referred to by Mr. Madison in the Federalist, No. XLVIII."

3. Congress Can Delegate to the Judiciary the Power of Recall of Absent Citizens Wanted as Witnesses.

The appellant claims, although not dignifying the claim as a separate point, the exercise of the right of recall is an executive or legislative function and that hence Congress could not confer it upon the federal judiciary. (B. 29.) *Myers, Administratrix v. United States,* 272 U. S. 52 (1926), is cited. The only specific reference in the case to the right of recalling citizens which we can find is in the dissenting opinion of Mr. Justice McReynolds, from which we have quoted *supra.* The statement there is that the legislature shall have the power of recalling the citizens and may delegate it to the executive. If the power is in the legislature we perceive no reason why it may not delegate the power to the judiciary, as well as to the executive, for purposes appropriate to the administration of justice.

The appellant also cites *Federal Radio Com. v. General Electric Co.,* 281 U. S. 464 (1930). (B. 29.) This case merely holds the review by the Court of Appeals of the District of Columbia under the Radio Act of 1927 (c. 169, 44 Stat., pt. 2, 1162) as amended in 1928 (c. 263, 45 Stat. 373) and in 1929 (c. 701, 45 Stat. 1559), is an administrative and non-judicial review from which there is no appeal to the Supreme Court since it is a constitutional court and cannot be invested with non-judicial functions.

The power to subpoena witnesses for cases pending in court, is, of course, judicial (40 *Cyc.,* p. 2155, par. A), though the court may use the executive arm of the government for ministerial acts involved in serving the sub-

poena and carrying out its orders. The power of subpoenaing witnesses is no less judicial in nature when it recalls the witness from abroad. Under such circumstances the function is not so foreign to judicial functions but that it may be made to reside in the judiciary. Furthermore, the order of recall is the combined act of the legislative, judicial and executive arms of our sovereignty. The Walsh Act gives the authority of the legislative branch. The petition for the allowance of the subpoenas is an act of officers in the executive branch of our government. The order of the court allowing the subpoenas is the approval of the judicial branch. The subpoena is served through the executive branch and is in form and substance a notice of the command of the President as well as of the court. How, then, can it be properly said that the recall is by the judiciary?

Making the recall depend in part upon action of the judiciary does not render the statute an invalid delegation of legislative power.

In *Field v. Clark,* 143 U. S. 649, at 694 (1892), this Court quotes with approval from *Locke's Appeal,* 72 Pa. St. 491, 498 (1873), as follows:

> "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make its own action depend. To deny this would be to stop the wheels of government."

Bakelite Corporation, Ex Parte, 279 U. S. 438 (1929).

This case was decided upon a petition for a writ of prohibition to the Court of Custom Appeals prohibiting it from entering an appeal from findings of the tariff commission. Prohibition was denied. It is said in the opinion, page 451:

"Legislative courts also may be created as special tribunals to examine and determine various matters arising between the government and others which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals."

We also cite: *Chapman, In re,* 166 U. S. 661 (1897).

So also the question as to whether a witness should be subpoenaed, even though involving recall from abroad, when it pertains to a case pending in court, is peculiarly a judicial question which is naturally within the judicial function that can be deputed by Congress. It would be contrary to common sense to require a special act of the Congress every time a citizen is desired from abroad to be a witness in a case pending in court.

4. The Duty of Allegiance is a Sufficient Basis for Jurisdiction In Personam.

We do not claim the United States has the right to invade by force the territory of another sovereign against its will and to take a citizen into custody and forcibly return him to this country, but we claim the United States has the right to create an obligation of citizens abroad to return, to enforce the obligation by an exercise of power within the territorial domain of the United States, provided the citizen has had the notice essential to due process.

In so far as power is essential to jurisdiction, the requirement is met by (1) power to withdraw protection of the citizen, (2) power to compel expatriation, (3) power to take the citizen into custody should he ever be found within the territories of the United States, and (4) power to take possession of his property within the territories of the United States. None of these powers depend in any

sense upon the consent, express or implied, of the sovereign of residence, nor do any of them in any way interfere with the independence, equality, peace or dignity of the sovereign of residence.

The relationship of sovereign and citizen is a status known as citizenship (Webster's New International Dictionary "Citizenship"). It may be something analogous to the marital status as far as jurisdictional consequences are concerned. (*Luria v. United States*, 231 U. S. 9 (1913); *United States v. Knight*, 291 F. 129, 131 (1923), affirmed 9th C. C. A., 299 F. 571; *Thompson v. Thompson*, 226 U. S. 551, 562 (1913)).

The American Law Institute has issued what it calls "Proposed Final Draft No. 1 on the Law of Conflict of Laws" with Professor Joseph H. Beale of Harvard Law School as the reporter and eleven eminent members of the bar as advisors, from which we quote as follows:

> "Section 80. A state cannot exercise through its courts judicial jurisdiction over a person, although he is subject to the jurisdiction of the state, unless a method of notification is employed which is reasonably calculated to give him knowledge of the attempted exercise of jurisdiction and an opportunity to be heard."
>
> "Section 82. The exercise of jurisdiction by a state through its courts over an individual may be based upon any one of the following facts:
>
> (a) He is personally present within the state;
>
> (b) He has his domicile within the state;
>
> (c) He is a citizen or subject owing allegiance to the state;
>
> (d) He has consented to the exercise of jurisdiction;
>
> (e) He has by acts done or events caused by him within the state subjected himself to the jurisdiction."
>
> "Section 85. A state can exercise through its courts jurisdiction over an individual domiciled within the state, although he is not present within the state

COMMENTS:

a. A state has jurisdiction over a person domiciled in the state and can exercise jurisdiction over him through its courts by rendering a judgment imposing a personal liability upon him. Such a judgment is valid in the state in which it is rendered and will be recognized by other states as valid."

"Section 86. A state which in the law of nations has standing as a nation can exercise through its courts jurisdiction over its nationals, although they are not present or domiciled within the state." —— See also Sections 43, 48, 49.

In 27 *Harvard Law Review*, at pages 464 to 466, there is comment upon the case of *Grubel v. Naussauer*, 210 N. Y. 149 (1913), one of the cases cited by the appellant, which will be noted later herein, in which the editors say:

"It is to be regretted also that the court takes the view that foreign judgments are enforced solely by virtue of comity. * * * Granting jurisdiction the judgment raises a right in the plaintiff and a correlative duty in the defendant. * * * The duty of obedience to the court's command is the common-law basis for jurisdiction *in personam*. * * * It would seem also that the duties arising out of citizenship ought to be enough to confer personal jurisdiction. Obedience to the sovereign is the first principle of all law."

The decision of the trial court in the case at bar received the following comment in 41 *Harvard Law Review* at page 1067:

"The allegiance owed by a citizen to his state has frequently been declared sufficient to give personal jurisdiction over a citizen abroad. * * * Moreover, the reasonable notice required by the statute satisfies the constitutional guaranty of due process. Granting this, no difficulty is found with satisfying the contempt judgment out of the recusant witness' property situ-

ated within the country, since this procedure is paralleled by the familiar process for the attachment of the property of a non-resident defendant by an action *quasi in rem.*"

The *Michigan Law Review*, Vol. 30, pages 137 to 142, reviews the decision of the Court of Appeals in the case at bar and concurs with the opinion of that court in every respect. The same is true of the editorial in *The American Journal of International Law* by Professor Edwin D. Dickinson, of the University of Michigan Law School. (Said journal, October, 1931, Vol. 25, No. 4, pp. 723, *et seq.*)

Dicey, Conflict of Laws, 4th ed., 396;
Goodrich, Conflict of Laws, 137, 139;
Story, Conflict of Laws, 8th ed., 754;
Wharton, Conflict of Laws, Sec. 649, n. 3;
2 *Moore, International Law Digest*, 243;
1 *Oppenheim, International Law*, 3rd ed., 338;
1 *Wheaton, International Law*, 6th ed., 269, 272;
Foote, Private International Law, 3rd ed., 551, 552;
Nelson, Private International Law, 360;
Westlake, Private International Law, 5th ed., 25 *et seq.*;
1 *Piggott, Foreign Judgments and Jurisdiction*, 248 *et seq.*;
6 *Halsbury's Laws of England*, 284;
50 *L. R. A.*, note, 577, 586;
Glover v. Glover, 18 Ala. 367 (1850);
Hamill v. Talbott, 72 Mo. App. 22 (1897);
Hunt v. Hunt, 72 N. Y. 217 (1878);
Frothingham v. Barnes, 9 R. I. 474 (1870);
Ouseley v. Lehigh Valley Trust & Safe Deposit Co., 84 F. 602 (1897).

We reserve for citation under subsequent headings in the development of our answer to appellant's point "A",

many decisions perhaps even more persuasively supporting jurisdiction *in personam* based upon the duty of allegiance owed by a citizen to his country. For instance, such cases as—*Bartue and Duchess of Suffolk; Knowles v. Luce; Schibsby v. Westenholz; Douglas v. Forrest* (English cases), and *Luria v. United States; Mabee v. McDonald; McDonald v. Mabee; In Re: Hendrickson; Langdon v. Doud; Henderson v. Staniford* (American cases, including decisions of this Court).

E. THE NOTICE OF RECALL NECESSARY TO DUE PROCESS AS A PREREQUISITE TO PUNISHMENT FOR DISOBEDIENCE MAY BE SERVED ABROAD.

1. General Statement.

We have shown that the action of the court in ordering the issuance of a subpoena for a citizen abroad creates an obligation and duty of the citizen to return. We recognize that the citizen could not be punished in accordance with due process or natural justice for failing to fulfill his obligation and duty if he received no notice of the order and was therefore unaware of the happening of the condition which transformed his potential obligation and duty into an actual duty. In view of the concessions of the appellant as hereinbefore analyzed this question is reduced to the right of the United States to give such notice through a messenger instead of through a fiction.

In answering the question, cases sustaining the sufficiency of extra-territorial service of notice in actions *in rem* and *quasi in rem* are just as helpful as in cases *in personam* and cases in contempt. If there were no right under international law to serve a notice personally upon a citizen in another sovereignty then whatever effect is required of such notice is just as invalid fulfillment of the purpose in one case as in another.

2. England Has Exercised the Right to Send Messengers to Give Notice of Recall to Absent Subjects.

In 1559 The Exchequer decided the case of *Bartue and Duchess of Suffolk* (2 Dyer's Reports 176b; 73 Eng. Rep., full reprint, 388). Queen Mary had given Bartue permission to go to Germany to collect debts due the estate of the Duke of Suffolk. The Duchess of Suffolk followed without license. In truth both left for religious reasons. The Queen sent a messenger with summons under seal commanding their return, but their servants attacked the messenger and forced his return without service of the summons. The messenger reported to chancery and chancery issued *mittimus* to exchequer. Exchequer issued a commission to a gentleman in Lincoln County reciting the contempt and directed seizure of all real, personal and mixed property of the fugitives and return of rents into the exchequer. This was done until 1558 when the fugitives filed a traverse in the exchequer to the charge of contempt alleging they did not adhere to enemies of England and that the purpose for getting the license had not been completed. The Judges held the fugitives guilty of contempt.

In 1579 the Exchequer division of Court of Common Pleas decided *Knowles v. Luce* (Moore 109; 72 English Reports, Full Reprint, 473). Knowles brought ejectment against Luce involving a copyhold. The title turned on the validity of seizure under order of the Queen. The property had belonged to Englefield who was given a license to go abroad. Subsequently the Queen sent a messenger with summons for his return which was delivered but not obeyed. Thereupon the Queen issued a warrant reciting the contempt and directing commissioners to seize his property. This manor was one piece of property seized. The income was paid to the Queen. The procedure was repeated in 1570 under a statute that year passed. Finding was for Knowles and it was said in the opinion (p. 474):

"The reason for the judgment as it was delivered by Manwood, Chief Barron, was such (that is) that the thirteenth and fourteenth statutes of Elizabeth were made in accordance with the common law, and did not give the Queen any new right, but only explained what she had before; *for by ancient prerogative, the Queen had a natural interest in the person of each subject, to serve her in such capacity as she should appoint;* and for this the common law gives the principle of *'non exeas Regnum'* (Do not leave the Country) before the subject goes outside of the Realm, *and when he is overseas, the common law gives the Queen liberty to recall him, and if he does not wish to return then the Queen can seize his lands until he returns, and use the profits in the maintenance of others to do the service that he would do her if he were in the Realm;* and also to restrain him from the ability and power of continuing in his disobedience; and with respect to this he cites two precedents in the Exchequer, viz. the case of Mortymer in the reign of Edward II and the case of Bartue in the reign of Queen Mary."

3. Notice May be Personally Served Extra-Territorially in Actions in Rem and Quasi in Rem.

Many of the states of the United States have statutes providing that in actions *in rem* and *quasi in rem,* as in so-called foreign attachment cases, among other methods of giving notice, the notice may be mailed or personally served, even outside of the territorial limits of the state. (50 *Corpus Juris,* p. 542, §213, p. 543, §215.) Under such statutes, the giving of personal notice abroad has never been condemned as an invasion of foreign sovereignty.

Perez v. Fernandez, 220 U. S. 224 (1911).

In this case Fernandez recovered a judgment against Perez and another setting aside certain mortgages and judicial sales of property in Porto Rico, as fraudulent and simulated. Perez was a resident and a citizen of Spain.

Section 57 of Judicial Code provided that the absent defendant should be served, *"if practicable wherever found."* The marshal made a return that he could not be found for personal service. Publication was resorted to and a default judgment was obtained. Within a year Perez appeared to set aside the judgment but the trial court made a condition of granting the request that Perez prove that he had received no actual notice of the pendency of the action in which Fernandez had recovered judgment. Perez was unable to make such proof and the trial court refused to set aside Fernandez's judgment. This Court reversed the decision but said in the opinion (pages 230-231):

> "After thus giving authority to the court to authorize the actual personal service of a notice outside of the district, the statute then, in cases where such *personal notice is impossible,* provides for publication * * *, * * *. In other words, where the property is situated in the district where the suit is brought as provided in the statute the right of the court to exert its authority is made to depend upon two forms of notice, which are distinct one from the other. First, an actual notice calling upon the person to appear, and which, in virtue of an express authority of the court, may be served upon the party outside of the district where the suit is pending. Second, a notice by publication calling upon the party to appear and defend within the statutory time, this latter notice, however, being only necessary where the former method cannot be employed. Considering the two distinct subjects, the proviso of the statute ordains that where the actual personal notice has not been made as provided and publication has therefore been resorted to, that within a year the party has a right to appear and the case must be reopened to permit him to make his defense."

See also *Mellen v. Moline Malleable Iron Works,* 131 U. S. 352 (1889).

The wide range of states recognizing the right to go upon foreign soil to give such notice is indicated by the following citations:

Thompson v. Thompson, 35 App. D. C. 14, Aff'd. 226 U. S. 551, 564 (1913);
Simonson v. Typer, 285 F. 240 (C. C. A. 8) (1922);
First Nat. Bank v. Eastman, 144 Cal. 487; 77 P. 1043 (1904);
Miller v. Davison, 31 Iowa 435 (1871);
Case v. Bartholow, 21 Kan. 300 (1878);
Winneth Times Pub. Co. v. Berg, 265 P. 710 (Mont. 1928);
Stone v. Anderson, 25 N. H. (5 Fost.) 221 (1852);
Abrahams v. Mitchell, 8 Abb. Prac. (N. Y.) 123, 341 (1859);
Jenkins v. Fahey, 73 N. Y. 355 (1878);
Garfein v. McInnis, 227 N. Y. S. 85, Aff'd. 248 N. Y. 261; 162 N. E. 73 (1928);
Winter v. Winter, 256 N. Y. 113; 175 N. E. 533 (1931);
Fidelity & C. Co. v. Green, 200 N. C. 535; 157 S. E. 797 (1931);
Williams' Adm'rs. v. Welton's Adm'rs., 28 Oh. St. 451 (1876);
George Norris Co. v. Levin's Sons, 81 S. C. 36, 61 S. E. 1103 (1908);
Rozink v. Becker, 68 Wash. 68, 122 P. 593 (1912);
Pier v. Amory, 40 Wis. 571 (1878);
Snyder v. Breitinger, 139 S. E. 755 (W. Va. 1927).

Thus it is clear that when sufficiently authorized by statute a court's process of notification may run to a foreign country in such a way as to give the court jurisdiction over matters subject to its territorial jurisdiction. In other words it satisfies due process as to notice. The duty of

allegiance owed by the appellant to the United States gave the court below, by virtue of the Walsh Act, such territorial jurisdiction as authorized the order of recall. The order of recall having been made due process as to notice thereof could be satisfied by personal service outside of the territorial jurisdiction of the court even in a foreign country.

4. Constructive Service by Publication is Sufficient for Judgment in Personam Against a Citizen.

Luria v. United States, 231 U. S. 9 (1913).

This was a proceeding under Section 15 of the act of June 29, 1906, (34 Stat. 596, 601 c. 3592) to cancel the certificate of naturalization issued to Luria. The statute provided:

> "* * * and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the state or place where such suit is brought." (page 20)

Luria had resided in Transvaal, South Africa, for approximately 18 years and did not return for the hearing. Although he filed an answer and no special question was raised as to the validity and significance of notice by publication under such circumstances the statutes together with the following observation of the court seems very significant:

> "Several contentions questioning the constitutional validity of Section 15 are advanced, but all, save the one next to be mentioned, are sufficiently answered by observing that the section makes no discrimination between the rights of naturalized and native citizens, and does not in anywise affect or disturb rights

> acquired through lawful naturalization, but only provides for the orderly cancellation, *after full notice and hearing,* of certificates of naturalization which have been procured fraudulently or illegally." (page 24)

The one question referred to in the above quotation was as to the validity of the prima facie fraudulent effect given by the statute to return to the country of nativity or taking permanent residence in any other foreign country within five years after the issuance of such certificate. That provision of the statute was held valid.

Although, under the statute involved in the *Luria* case, it is the practice to give personal notice of such a proceeding through an American consul, (*infra* p. 84), still such personal service is not required as to absentees and nevertheless the opinion observes that the citizen has "full notice" by publication. The proceeding is for a judgment *in personam* that the citizen's naturalization was fraudulent or illegal. Of course it is *quasi in rem* to the extent that the court preliminarily seizes upon the citizenship status as a basis of jurisdiction. Likewise the court issuing a subpoena under the Walsh Act is acting *in personam* and *quasi in rem* to the same extent as in cancellation of naturalization cases.

Douglas v. Forrest, (1828) 4 Bing. (Eng.) 686.

A Scottish court's decree in a suit *in personam* on an acknowledged debt was enforced by the English court even though the Scottish decree was rendered against the defendant Scotchman while he was absent in India upon notice by proclamation. Chief Justice Best, in delivering the opinion, said (page 702):

> "A natural born subject, of any country quitting that country but leaving property under the protection of its law, even during his absence, owes obedience to those laws, particularly when those laws enforce a moral obligation."

This case was followed in *Cowan v. Braidwood,* (1840) 9 Dow. P. C. (Eng.) 26, 33-7, and in accord with it see *General Steam Navigation Co. v. Guillou,* (1843) 11 M. & W. (Eng.) 877, 894.

Mabee v. McDonald, infra, the decision of the Supreme Court of Texas, supports jurisdiction *in personam* of citizens upon service by publication. This Court reversed the decision (*McDonald v. Mabee, infra*), without disapproving of the reasoning of the Texas court, but because this Court took a different view of the facts as to the residence, and therefore the citizenship of Mabee. The decision of this Court was so interpreted by the Texas Court of Civil Appeals in *Becker v. Becker,* 218 S. W. 542, 545 (1920). And this Court cites *McDonald v. Mabee* as a non-resident case in *Hess v. Pawloski, infra.* Nevertheless, we prefer to cite the Texas case under our next heading because of language in the opinion of this Court.

If service by publication only is inadequate for a proceeding purely *in personam* against a citizen (not involving preliminary seizure of a *res* or action in reliance upon a *status*) it is not because the court lacks jurisdiction of the person or personal relations of the citizen but because the quality of such service does not satisfy due process for the reason that other methods were available and more likely to result in actual notice to the citizen abroad. (50 *C. J.,* p. 500, §111.) Thus, service by publication when sufficient is valid because the circumstances are such (impossible to locate his last place of abode in the state or nation or to discover his address abroad, 50 *C. J.* p. 547, §224) that there is no other reasonably available method of service and because the presumption can be fairly indulged that actual notice will reach the citizen abroad.

The point we make is that indirect service of notice in a foreign country is not "an invasion of foreign sovereignty" and it is not the nature of the "command" or notice that can be considered offensive.

5. Substituted Service by Leaving Summons at Last Place of Abode is Sufficient for Judgment in Personam Against an Absent Citizen.

McDonald v. Mabee, 243 U. S. 90 (1917).

We gather implied authority from the decision of this Court in this case for the validity of extra-territorial service upon absent citizens for a judgment in *personam*, and, in order to fully understand the decision, we believe it is necessary to consider the facts and the opinion of the Supreme Court of Texas from which it came to this Court. (*Mabee v. McDonald*, 107 Tex. 139 (1915)).

The *Mabee* case was a suit upon a promissory note. The defense was primarily that the plaintiff had recovered a judgment upon the same note in a previous Texas suit, which judgment purported to bind the defendant personally as well as to foreclose a lien by which the note was secured. At the institution of the former suit, the defendant Mabee was domiciled in Texas but had left the state with intent to establish a home elsewhere, his family, however still residing there. He subsequently returned to Texas for a short time and later established a Missouri domicile. Service was effected by publication in a newspaper after the defendant's final departure from Texas. In holding that the defendant was still a Texas citizen and that such service of process was valid, the court reviewed the English and American decisions, stated that the doctrine of *Pennoyer vs. Neff* was now settled law in Texas and the United States *as to non-residents*, and then enunciated the doctrine of sovereign control by the state over its absent citizens in the following language (pp. 173-174):

> "The ground upon which that doctrine rests has been stated thus:
>
> 'Every subject or citizen of a country where legal proceedings are instituted owes allegiance to

his country and submission to its laws. He impliedly consents to be bound by its laws so long as he remains a citizen and resident; *and when the state enacts a statute with reference to procedure every citizen of necessity consents, and no matter where he may be does not change that assent until he renounces his former allegiance and in fact becomes a non-resident.'*

Dissenting opinion in *Raher v. Raher, supra* (129 N. W. 494 (Iowa 19th)). To the same effect is the dissenting opinion from our court of civil appeals in the case before us."

"This may be added: The laws of a state bind its citizens, whether they be considered as assenting thereto or not."

"Among the authorities which support said doctrine of sovereign control with more or less force are these:

(Citation of authorities follows.)

"In the majority opinion in *Raher v. Raher, supra,* decided Jan. 19, 1911, it was said: 'It must be conceded, however, that we have found no case in which it has been specifically held under pertinent facts *that a personal judgment against a resident, who is actually served with notice outside the territorial limits of the state is void.'* In the dissenting opinion therein it was said:

'No court, so far as I have been able to find, has gone to the extent (to) which the majority find it necessary to go in this case.'

"*Black on Judgments,* 2nd ed., says in par. 227:

'Every sovereignty has plenary control over its own subjects, and it may *authorize a judgment to be rendered against one of its citizens, upon constructive notice only, and although he is temporarily absent from its dominions,* and such a judgment must be everywhere recognized as valid and of binding force and effect.' See also, par. 907.

"*Freeman on Judgments*, 4th ed., par. 570, says:

'In relation to the extraterritorial effect of a judgment procured against a person in the state of his domicile, in an action in which he entered no appearance, and in which the process was served constructively, in accordance with the laws of that state, radical and irreconcilable difference of opinion exist. * * * *The position, however, which seems to be the best sustained, both by reason and by precedents, is that each state has the authority to provide the means by which its own citizens may be brought before its court; that the courts of other states have no authority to disregard the means thus provided, and finally, that every judgment or decree obtained in a state against some of its citizens, by virtue of a lawful though constructive service of process, should be as obligatory upon such citizens in every other state as it is in the state whence it is taken.*' "

In the opinion of this Court by Mr. Justice Holmes reversing the Texas court upon the ground that Mabee was not at the time a citizen of Texas (*Hess v. Pawloski, infra*, and *Becker v. Becker, supra*), it is said, 243 U. S.:

(p. 91) "No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance, but the foundation (physical power) should be borne in mind. Subject to its conception of sovereignty even the common law required a judgment not to be contrary to natural justice. * * *

(p. 92) "There is no dispute that service by publication does not warrant a personal judgment against a *non-resident.*" (This is equivalent to "non-citizen.") (Our parentheses).

"Some language of *Pennoyer vs. Neff* would justify the extension of the same principle to absent parties, but we shall go no farther than the precise facts of this case require. When the former suit was begun Mabee, although technically domiciled in Texas, had left the State intending to establish his home elsewhere. Perhaps in view of his technical position

and the actual presence of his family in the State a *summons left at his last and usual place of abode would have been enough. * * * To dispense with personal service the substitute that is most likely to reach a defendant is the least that ought to be required if substantial justice is to be done.*"

The language just quoted is very significant. First, it recognizes that jurisdiction may be acquired over non-residents in other ways than by personal service within the territorial limits of the state or by appearance. This statement construed in the light of the opinion of the Supreme Court of Texas implies recognition of jurisdiction by virtue of the allegiance due from a citizen provided there is a foundation of physical power. We have shown that physical power, coercive power, exists in the case of citizens in four respects at least. Second, the language of Mr. Justice Holmes indicates that a summons left at the last and usual place of abode would have been enough because it is a method of substituted service most likely to actually reach the defendant. In other words the notice, even though as far as the officials are concerned, is delivered within the territorial limits, is calculated to be forwarded and actually received outside of the territorial limits.

Substituted service is deemed personal service. (50 *Corpus Juris*, p. 490, § 94.) Of course when actual personal service is made outside of the territorial limits there is no cause for resort to fiction and circuitous justification and no doubt that substantial justice is done.

Many states have statutes permitting personal judgments to be obtained against domiciled-resident-citizens even though temporarily absent from territorial limits if service is made (1) by leaving the summons at the defendant's last place of abode, or, (2) by publication and mailing to or personal delivery to the defendant outside the

state. These statutes, if calculated to afford reasonable notice are constitutional. (See note in Vol. 35 of Lawyers' Reports Annotated (N. S.), pages 292 *et seq.*)

Langdon v. Doud, 88 Mass. 423, 435;
Henderson v. Staniford, 105 Mass. 504, 505;
Nichols v. Vaughan, 217 Mass. 548.

In the latter case the question presented was whether the Massachusetts statute of limitations had been tolled by the absence of the debtor in Europe during a period of approximately seventeen years. The contention was urged that the statute ran only during such period of time as personal service of process could have been made within the jurisdiction. The court held the statute was not tolled because under the Massachusetts practice actual notice of a pending action was sufficient to support a personal judgment rendered against an absent citizen. Chief Justice Rugg quotes approvingly from Chief Justice Bigelow in *Langdon v. Doud,* 88 Mass. (6 Allen) 423 at 425, the following:

> "So long as a debtor has a last and usual place of abode in the commonwealth, that is while he retains his domicile or residence here, the courts of the state have jurisdiction over him and due service of legal process can be made upon him. * * * a writ can be served by leaving a summons at his last and usual place of abode, and in case of his absence from the state actual notice * * * can be given to him so that a valid and binding judgment can be obtained."

Here again we see that notice is to reach the absent citizen in foreign territory, yet such statutes are not invalid as calling for an invasion of foreign sovereignty either where the notice is implied or where it is mailed or where it is directly and personally served.

6. A Person May Give Implied Consent to Personal Service in Foreign Territory.

If a person may give implied consent to service of process upon himself in a foreign sovereignty, clearly such service is not an invasion of the sovereignty of the state or nation for no individual can waive the immunity of a government against violation of its rights under international law.

In *Hess v. Pawloski*, 274 U. S. 352, 355 (1927), the Massachusetts statute, providing that use of the highways by non-residents constitutes an implied appointment of the Registrar to receive process for any proceeding growing out of any accident, the statute including provision for personal service by mail outside of the state was held constitutional.

Wuchter v. Pizzutti, 276 U. S. 13 (1928).

This case involved the validity of a New Jersey statute like that in *Hess v. Pawloski, supra*, except that personal service by mail was not required. In the opinion by the late Mr. Chief Justice Taft, it is said (page 24):

> "These cases (*McDonald v. Mabee, supra* and *Roller v. Holly*, cited *infra*, among others) and others indicate *a general trend of authority toward sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with the defendant will receive actual notice*, and that is the principle that we think should apply here.
>
> "But it is said that *the defendant here had actual notice by service out of New Jersey in Pennsylvania.* He did not however, appear in the cause and such notice was not required by the statute. *Not having been directed by the statute it cannot, therefore, supply constitutional validity to the statute or to service under it.*"

(Applied in *Gilbert v. Burnstine*, 255 N. Y. 348; 174 N. E. 706 (1931).)

These last two cases, *Hess v. Pawloski* and *Wuchter v. Pizzutti*, construed together show plainly that even in an action *in personam*, the service of notice outside the territorial jurisdiction of the state is proper and will satisfy the requirements of due process as to notice. The right to give such notice extra-territorially to such a non-resident and therefore alien is predicated upon implied consent. In the case at bar, no implication is necessary for the appellant's citizenship gave the United States, and, through the Walsh Act, the court the necessary jurisdiction, or, one may say, the inherent consent of the appellant.

Once more extra-territorial service of notice does not seem to be considered an invalid invasion of a foreign sovereignty. Since it is the extra-territorial notice that is vital, we think it follows that, pursuant to such implied consent, the formality of serving a state official could be dispensed with if the statute required personal service upon the defendant wherever found. Cognovit notes are an instance of express consent pursuant to which no substituted service on a state official is necessary.

7. Citizenship Supports Jurisdiction in Personam Upon Extra-Territorial Personal Service Only.

In the recent South Dakota case of *In re Hendrickson*, 167 N. W. Rep. 172 (1918), service of process in Minnesota upon an absent South Dakotan was sustained in a suit to appoint a guardian for a mental incompetent. The opinion reviews at length the Texas case of *Mabee v. McDonald*, the Iowa case of *Raher v. Raher*, and the other state decisions and decides that a state may render a valid personal judgment against an absent citizen or resident not served personally with process within the state. The following quotation is from the opinion (p. 174):

"Since the opinion in the *Raher* case the Supreme Court of Texas has given this matter just as thorough consideration as did the learned Justice McClain in the *Raher* case, and has arrived at the opposite result in the case of *Mabee v. McDonald,* 107 Tex. 139, 175 S. W. 676, basing its decision largely upon the principle of the amenability of the citizen of a state to its laws and upon the right of a state to provide by statute for the character of the service of process that may be made upon the absent citizen, in which view we concur."

"A review of the many decisions of the courts of this country is unnecessary, for they have all, or nearly all, been exhaustively reviewed in the *Raher* case and in the Texas case. * * *"

"It must be conceded, under the statutes above referred to, and under the great weight of judicial authority, that, if the citation had been served by leaving a copy at the Salmonson home in Brookings County with the proper member of the family, no question could have been successfully raised as to the character of the service. In the case note to the *Raher* case the scholarly annotator in 35 *L. R. A.* (N. S.) on pages 296, 297, has critically analyzed the situation, and by what seems to us to be unanswerable logic, has arrived at the same conclusion as the Texas court. We should like to adopt the whole of his 'conclusion' as a part of this opinion but space forbids more than the following portions: * * *

"We therefore conclude that under our laws, which do not violate the principles of due process of law insofar as absent citizens of this state are concerned, the County Court of Hamlin County acquired jurisdiction over the person of the alleged incompetent by the service of the citation upon her in the State of Minnesota."

The appellant cites *De La Montanya v. De La Montanya,* 44 Pac. 345 (Calif. 1896). (B. 8, 15). In that case the court held service by publication conferred no jurisdiction to render a personal judgment for alimony in a divorce proceeding against a citizen of California who had gone to

France. The majority opinion relies chiefly upon language in *Pennoyer v. Neff,* 95 U. S. 714 (1877), whereas that was a case involving a non-resident and hence a non-citizen. And in the syllabus prepared by Mr. Justice Field, himself, (24 L. ed. 565, foot-note) the law of the case is confined to non-residents. The *De La Montanya* case was a five to three decision in which the Chief Justice was one of the dissenters. In line with this Court's opinion in *McDonald v. Mabee, supra,* the decision might have gone on the inadequacy of service by publication only but the opinion of the majority is not so restricted.

Another case cited by the appellant is *Smith v. Grady,* 68 Wis. 215; 31 N. W. 477. (B. 15) While it appears from the statement of facts preceding the opinion that the defendant resided in Ontario the opinion itself said that he was not a resident of Ontario. The foot-note following the opinion in 31 N. W. cites other cases in which service outside of the territorial jurisdiction of the court upon *non-residents* has been held to be invalid, thus the view of the case is indicated as being a non-resident case.

Raher v. Raher, 150 Iowa, 511; 129 N. W. 494 (1911), is cited by the appellant. (B. 15) In that case a personal judgment on personal service of process made on a resident out of the state was held invalid. Chief Justice Sherwin and Mr. Justice Deemer concurred in a dissenting opinion.

The Supreme Court of Texas in *Mabee v. McDonald, supra,* and the Supreme Court of South Dakota, in the *Hendrickson* case, preferred the reasoning of the minority opinions in the *De La Montanya* and *Raher* cases. And, as aforesaid we believe this Court in *Mabee v. McDonald, supra,* approved of the reasoning of the Supreme Court of Texas, except as to the quality and therefore due process of service upon a non-resident citizen by publication only when service at his last place of abode was possible.

The careful editors of Lawyers' Reports Annotated (n. s.) Vol. 35, before and without the advantage of the opinions in the *Mabee v. McDonald* and the *Hendrickson* cases agreed with the minority opinions in the *De La Montanya* and *Raher* cases and concluded: (page 297)

> "Certainly, from a practical point of view whatever may be said in its favor from a technical legal point of view, a doctrine which concedes the efficacy of a kind of service which at most only renders probable actual notice to a resident defendant of the pendency of the suit, and denies the efficacy of a mode of service which insures actual notice, although imparted by an act which takes place out of the state, has but little to recommend it."

(a) *Non-Resident cases affecting aliens cited by appellant are not in point.*

The appellant cites many cases which hold that a state court may not render a personal judgment against an absent alien who was not personally served with process within the state and who did not voluntarily enter appearance. Cases of this type do not embrace the element of citizenship with its duty of allegiance as a basis for jurisdiction. Process of a state against a non-resident is process against a non-citizen (first sentence of the 14th Amendment), whereas, process against a non-resident of the United States may, nevertheless, be process against a citizen of the United States. So the decisions denying the validity of state process on a non-resident of the state, served without the state, are inapplicable to the cases at bar.

Pennoyer v. Neff, 95 U. S., 714 (1877), is cited by appellant (B. 24). Neff sued Pennoyer for possession of land in Oregon. Neff claimed under a United States patent and Pennoyer claimed under a sheriff's sale upon execution for a judgment of an Oregon state court in an action by Mitchell

against Neff upon a money demand on account for service as an attorney. Neff was then a non-resident and service was by publication under the Oregon statute. The Supreme Court held that the Oregon court had no jurisdiction under such service to render the judgment in the *Mitchell* case and affirmed judgment for Neff. It is said in the opinion of the Supreme Court, referring to the Oregon statute (page 720):

> "Construing this latter provision to mean that in an action for money or damages, where a defendant does not appear in the court, and is not found within the State *and is not a resident thereof,* but has property therein, *the jurisdiction of the court extends only over such property,* the declaration (of the statute) expresses a principle of general, if not universal law."

The opinion also quotes from Mr. Justice Story in *Picquet v. Swan,* 5 Mason 35 (1848), (cited by appellant, B. 24) as follows (page 724):

> "Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him. Where he is not within such territory, *and is not personally subject to its laws,* if, on account of his supposed or actual property being within the territory, process by the local laws may, by attachment, go to compel his appearance and for his default to appear judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment *in personam,* for the plain reason, that, *except so far as the property is concerned,* it is a judgment *coram non judice.*"

(See note 35 L. R. A. (N. S.) 292, 297.)

Galpin v. Page, 18 Wall. 350 (1873), is cited by appellant (B. 24). This case involved the validity of a Cali-

fornia state court judgment against an infant resident of New York, pursuant to constructive service by publication. The Supreme Court held such judgment *in personam* was invalid upon the ground that the laws of one state as to service of process could not give authority for valid process against a non-resident (and thus a non-citizen). It is said in the opinion, page 369:

> "When, therefore, by legislation of a state, constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent party, *not a citizen of the state*, nor found within it every prineiple of justice exacts a strict and literal compliance with the statutory provisions."

Harkness v. Hyde, 98 U. S. 476 (1878), is cited by appellant, (B. 25). In that case, the territorial court of Idaho issued summons to be served upon the defendant in an Indian reservation which was not subject to the territorial jurisdiction of the territory of Idaho. The defendant was not a resident of the territory of Idaho and "not personally subject to its laws," hence, a judgment on such service was void. Appellant does not emphasize the only language in the opinion applicable to the cases at bar and that we will quote here (B. 47), page 478:

> "It is only where property of a non-resident or of an absent defendant is brought under its control, *or where his assent to a different mode of service is given in advance* that it has jurisdiction to inquire into his personal liabilities or obligations without personal service of process upon him or his voluntary appearance to the action."

Wilson v. Seligman, 144 U. S. 41 (1892), is cited by appellant (B. 25). The judgment sued upon in that case was rendered in an action in a Missouri state court and the Supreme Court emphasized that defendant "never was

a citizen or a resident of Missouri" but was served at his domicile in New York.

Cooper v. Reynolds, 10 Wall. 308 (1870), is cited by appellant (B. 24), as being a case holding that a state court may not render a personal judgment against an absent citizen who was not personally served with process within the state and who did not voluntarily appear. *As a matter of fact, the defendant had departed for parts unknown and it was not determined that he was a citizen at the time in question. Service was by publication only.* The judgment determining his personal obligation was sustained to the extent of the *res* that had been seized. In the opinion of the court by Mr. Justice Miller, how a proceeding basically *in personam* becomes *quasi in rem* is explained (318):

> "If the defendant appears the cause becomes mainly a suit *in personam*, with the added incident, that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But, if there is no appearance of the defendant and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff.
>
> "That such is the nature of this proceeding in this latter class of cases, is clearly evinced by two well-established propositions: *first, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or in any other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected of defendant out of any other*

property than that attached in the suit. Second, the court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return, that none can be found, is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court.

"Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem.*"

The nature of *quasi in rem* proceedings is also stated in *Freeman v. Alderson,* 119 U. S. 185 (1886).

None of the other cases cited by the appellant deal with the rights of a sovereign and its courts and executive officers duly authorized by statute with respect to absent citizens. Therefore, language in some of them to the effect that for a judgment *in personam* there must be service of process within the territorial limits of the sovereign or voluntary appearance of the defendant, in the light of the facts and issues, could not be intended as a completely inclusive and exclusive statement of law. If it were, then there would be no way to account for the many decisions of this Court sustaining judgments *in personam* upon express or implied consent in advance of the bringing of the action, or the many cases *quasi in rem,* which primarily adjudicated alleged personal obligations. Thus, we think it will be sufficient to merely list the appellant's other authorities of this type:

Boswell's Lessee v. Otis, 9 How. 336, 348 (1850), (B. 25);

Freeman v. Alderson, 119 U. S. 185 (1886), (B. 25);

Overby v. Gordon, 177 U. S. 214 (1899), (B. 25);

Brown v. Fletcher's Estate, 210 U. S. 82 (1908), (B. 25);

Baker v. Baker, Eccles & Co., 242 U. S. 394 (1917), (B. 25);

Goldey v. Morning News, 156 U. S. 518 (1895), (B. 25);

Moss v. Fitch, (Mo.) 111 S. W. 475 (1908), (RB. 15);

Indiana Transportation Co., Ex Parte, 244 U. S. 456 (1917), (B. 28);

Herndon v. Ridgeway, 17 How. 424 (1854), (B. 25).

F. A COURT'S JURISDICTION TO SUBPOENA WITNESSES IS NOT LIMITED TO ITS TERRITORIAL JURISDICTION OR ITS PHYSICAL POWER OVER THE PERSON OF THE WITNESS.

Generally, that is without special statutory authority, such as supplied by the Walsh Act, a court may not subpoena witnesses from outside its territorial jurisdiction but if the necessary legislative authority has been given to the court, and to the executive or administrative officers who are to carry out its orders, witnesses may be subpoenaed from anywhere provided the desired witness is in such relation to the state or nation that he owes an obligation and duty to obey its laws.

The case so much relied upon by the appellant in his briefs, *Robertson v. Railroad Labor Board*, 268 U. S. 619 (1925), supports our position. That case concerned the interpretation of the power of the railroad labor board under the transportation act of February 28, 1920, (c. 91 Section 310, Par. a & b, 41 Stat. 456, 472) to subpoena witnesses from any place in the United States and in case of failure of the desired witness to comply with the subpoena the right to "invoke the aid of any United States District Court." Robertson was served in Ohio with a subpoena to appear before the board at Chicago, Illinois. He did not

attend. The board brought proceedings in the Federal District Court for Northern Illinois in contempt. The summons in contempt was likewise served upon Robertson in Ohio. He objected to the jurisdiction of the court in Illinois, and this Court held, purely upon the interpretation of that statute, as a matter of venue, that Congress intended that the punishment proceedings would be in the Federal Court of the district where the witness resided. The opinion of this Court cites many instances (page 624) in which Congress had authorized writs of subpoena or summons to bring in parties from other jurisdictional districts than that of the court in which the proceeding was pending. It is also said (page 622):

> "Congress has power, likewise, to provide that the process of every district court shall run into every part of the United States. * * * But it has not done so either by any general law or in terms by Sec. 310 of Transportation Act, 1920. The precise question is whether it has impliedly done so by that provision."
>
> "In a civil suit *in personam* jurisdiction over the defendant, as distinguished from venue, implies, among other things, either voluntary appearance by him or service of process upon him at a place where the officer serving it has authority to execute a writ of summons. *Under the general provisions of law,* a United States District Court cannot issue process beyond the limits of the district, (citing authorities); and a defendant in a civil suit can be subjected to its jurisdiction *in personam* only by service within the district. (Citing authorities.) Such was *the general rule* established by the Judiciary Act of September 24, 1789, c. 20 Sec. 11, 1 Stat. 73, 79, in accordance with the practice at the common law, (Citing authorities) and such has been *the general rule* ever since."

In this case the court was dealing with a purely *in personam* as distinguished from a *quasi in rem* method of enforcing the attendance of the witness and not with the

scope of the power to subpoena. The court was not dealing with the power to authorize an officer to serve papers outside the territorial limits of his sovereign. The court was dealing with the rule established by the judiciary act and that existed at common law and was not considering the power to change the common law or the rule established by the judiciary act so as to permit jurisdiction *in personam* upon service without the territorial jurisdiction of the court. The language used on page 626 of the opinion shows plainly the view of this Court that if the statute had so provided the federal court for Illinois could have adjudicated the contempt charge even though the witness was beyond its territorial jurisdiction. The judgment of the Federal Court in Illinois might have been unenforcible by such court without affecting the validity of its judgment. This is brought out in another case much relied upon by the appellant in his briefs:

Michigan Trust Company v. Ferry, 228 U. S. 346 (1913).

Ferry was executor of an estate in Michigan and before being discharged moved to Utah. An administrator *de bonis non*, with the will annexed brought suit for an accounting in the original probate proceeding. Service of summons was under the Michigan statute by publication and personally in Utah. A personal judgment was rendered against Ferry for money of the estate appropriated to his own use. The judgment was sustained and it is said in the opinion:

> "*Ordinarily*, jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign's pleasure. * * * (353).
>
> "It is true that it (the decree) could not be enforced in Michigan while the defendant remained out of the state. *But while the want of power to enforce*

*a judgment or decree may afford a reason against entertaining jurisdiction (Giles v. Harris, 189 U. S. 475, 488 * * *), it has nothing to do with the validity of a decree when made.* * * (355-6).

"Jurisdiction is power, * * *." (356)

The court was careful to say it is only "ordinarily" that jurisdiction over a person is based on power to seize the person. It went on to say that jurisdiction is power and we have shown that there are at least four things which may be within the power of the sovereign with respect to the relation of the citizen to it. Further the court said that want of power to enforce a judgment does not necessarily affect its validity. Likewise, the fact that even under the Walsh Act or any possible legislation of the Congress, except pursuant to treaty, the appellant could not be bodily attached and brought to the United States, does not affect or bear upon the validity of the order of recall.

Toland v. Sprague, 12 Peters 300, (1838), (B. 25) holds, (p. 329):

"* * * the process of a circuit court cannot be served without the district in which it is established, *without the special authority of law therefor.*"

Minder v. Georgia, 183 U. S. 559 (1902), (B. 24) is another case in which there was no citizenship to create a duty to obey the subpoena of a foreign state and no statute authorizing the officer to make an extra-territorial service.

See also: *Jennings v. Johnson,* 148 F. 337, 339 (5th C. C. A., 1906).

The Walsh Act is ample for the cases at bar.

In addition to the instances cited in the opinion in the *Robertson v. Railroad Labor Board, supra,* in which the Congress has authorized subpoenas and summons to run beyond the territorial jurisdiction of the court, we cite R. S. Sec. 876; U. S. C. A. tit. 28, Sec. 654; Sept. 19, 1922,

c. 344, 44 Stat. 848. That statute authorizes subpoenas to run into any district in criminal cases and for a limited time the same was authorized in civil cases.

In addition to the *Michigan Trust Company v. Ferry* case, *supra*, we have cited decisions of this Court illustrating at least two other situations in which jurisdiction *in personam* exists for a valid judgment or decree even though the circumstances may be such that the judgment is unenforcible in the state or nation where rendered. We refer to *McDonald v. Mabee, supra*, where this Court indicates substituted service at the last residence of the absent citizen would be sustained and to *Hess v. Pawloski* and *Wuchter v. Pizzutti, supra*, in which service upon a statutory agent appointed by implied consent followed by personal service outside of the state, is held to support a judgment *in personam*. In neither case does the court or sovereign have power to seize the defendant and the probabilities are, especially in the latter type of cases, that there will be absolutely no way of enforcing the judgment in the state where rendered.

The appellant conceded, at pages 77 and 78 of his brief in the Court of Appeals:

> "But Congress may pass laws prescribing certain prohibitions to be observed by our citizens abroad * * *.
>
> "* * * The citizen, as was expressed by one writer, 'carries such laws around his neck,' but no sheriff accompanies him to enforce obedience."

So the appellant argues the United States can not invade another nation to attach the person of a desired witness and forcibly return him to the court. *Glass v. The Sloop Betsey*, 3 Dallas 6 (1794), (B. 25) is cited for the proposition that the United States can not exercise such power extra-territorially in the absence of treaty. The appellant cites *Rose v. Himely*, 4 Cranch 241 (1808) (B. 28); *United States v. Rodgers*, 150 U. S. 249 (1893), (B. 28); *The Hamil-*

ton, 207 U. S. 398 (1907), (B. 28); *American Banana Company v. United Fruit Company,* 213 U. S. 347, (1909), (B. 28); *United States v. Bowman,* 260 U. S. 94 (1922), (B. 28); and *Wheaton on International Law,* 8th ed. Sec. 113, pages 179, 180, (B. 30), for the proposition that all power over a citizen abroad must be exercised at home.

The Walsh Act prohibits citizens from remaining abroad after they are notified that they are wanted at home—the citizen carries that prohibition around his neck. All power "is exercised" at home under the Act, but the citizen is given "due process" by notice while abroad as to what is going on at home.

As we have many times said, coercive power exists, and actual physical power over the desired witness due to his presence within the territorial jurisdiction of the court, is unnecessary. A case like *Johnson, In re,* 167 U. S. 120 (1897) cited by the appellant, (B. 25) is not in point for it involved criminal jurisdiction. Of course, where the jurisdiction needed is such as will bring the person to the bar of the court to confront witnesses against him and to receive the sentence of the court, actual physical power over the accused may be necessary.

G. THE ACT OF SERVING A SUBPOENA IS A MINISTERIAL ACT OF GIVING NOTICE AND NOT AN EXERCISE OF "JURISDICTION."

The obvious theory of the Walsh Act is that if the court grants a petition for the recall and appearance of a citizen desired as a witness that the court thereby takes cognizance of and jurisdiction over the witness's status as a citizen and his relation to the United States and creates an obligation and duty of the citizen to return. But so far it is not such an obligation and duty as would authorize enforcement of a penalty for non-compliance. This is solely because due process and natural justice call for notice to

the citizen of the creation of his obligation and duty. It was a potential obligation, inherent in his citizenship, but he must have notice that it has been changed to an actual obligation. In changing the potential obligation and duty, over which the court always had jurisdiction pursuant to the Walsh Act, to an actual obligation and duty the court is no more exercising jurisdiction over his person than when two parties in different nations create obligations and duties of a contract by correspondence. To pursue the illustration further, the citizen by virtue of his citizenship inherently and necessarily authorizes his sovereign to create an obligation and duty of the citizen to return which the sovereign has the power and right to exercise, through its courts, and when the court does act the obligation and duty is as complete as when an offer of contract having been tendered is properly accepted.

So the Walsh Act requires as the second step that which is necessary to due process—notice—and exercises an option as to the form of the notice by specifying that it shall be in the form of a subpoena. That a subpoena is specified does not change the nature or function of what is required or what is given. Form yields to substance. As Mr. Justice Sutherland said in the opinion of this Court in *United States v. La Franca,* 282 U. S. 568, 572 (1931):

> "No mere exercise of the art of lexicography can alter the essential nature of an act or a thing, * * *"

It is said in 50 *Corpus Juris,* p. 442 § 1:

> "As employed in statutes the legal meaning of the word 'process' varies according to the context, subject matter, and spirit of the statute in which it occurs." (See also, *id.,* p. 443, § 3; and *Stevens v. Associated Mtg. Co.,* 107 N. J. Eq. 297, 152 A. 461 (1931) and *Emmerson v. Emmerson,* 129 Okl. 144, 265 P. 1078 (1928).)

The subpoena would have to be followed with a writ of bodily attachment before it would be anything more than

a notice, but even if the subpoena were considered a command which was being given in the foreign nation rather than in the United States, where in truth it is given, we have shown that the appellant has necessarily, in view of the authorities, conceded that such a command is not a violation of international law or in excess of the extra-territorial jurisdiction of the United States.

The remainder of the Walsh Act specifies the procedure which may be followed in case the citizen fails to fulfill his obligation and duty.

When it is said that the issuance and the service of a summons is an exercise of jurisdiction over the person summoned it is the issuance and not the service that is the exercise of jurisdiction except in so far as the service is necessary to due process, and hence to the jurisdiction of the court to render a valid judgment, and not in the international law sense. Of course there may be other kinds of process than subpoenas and summons which are, in their execution, an exercise of jurisdiction, such as writs of attachment. Also if the court has not taken jurisdiction of a subject matter, such as property, or a status such as citizenship, which is within its jurisdiction, the process may more properly be termed a jurisdictional act and command rather than a mere notice. But when the court has taken cognizance of and jurisdiction of a subject matter within its territorial jurisdiction its initial process in essential nature is a mere notice to come in and testify or defend or the consequences may be a default judgment or a penalty provided by statute as in the Walsh Act. (50 *Corpus Juris*, p. 467, § 56.) In other words, when the process runs to a person who is under no duty to the sovereign, whose duly authorized court issues the process, to obey the process or suffer the consequences, the process can more properly be called jurisdictional in other senses than for want of the notice necessary to due process. But when the duty pre-

exists, the process, no matter what its form may be, and under the Walsh Act, is a mere notice.

In *Bradey v. Mueller,* (22 So. Dak. 534) 118 N. W. 1035 (1908), it is said:

> "The main object of the summons is to notify the defendant that the plaintiff claims to have a cause of action against him and that he is required to answer such complaint." (P. 1037.)

We also cite:

Nichols v. Burlington, etc. Co., 4 G. Greene, (Iowa) 42 (1853);

Klingel v. Palmer, 42 Iowa, 166 (1875);

Zielica v. Worzalla, 162 Wis. 603; 156 N. W. 623 (1916);

Whitney v. Blackburn, 17 Ore. 564, 571, 21 P. 874 (1889);

Murphy v. Campbell Soup Co., 44 F. 2nd 214 (D. C. Mass. 1930);

Flannery v. Kusha, 143 Minn. 308; 173 N. W. 652 (1919);

In re Martin, 86 N. J. Eq. 265; 98 A. 510 (1916);

Sheldon v. Sheldon, 134 A. 904 (N. J. Ch. 1926);

Herndon v. Wakefield-Moore Realty Co., 143 La. 724; 79 So. 318 (1918);

Harrington v. Superior Court, 194 Cal. 185; 228 P. 15 (1924);

Williams, Adm'rs v. Welton's Adm'rs, 28 O. S. 451, 471 (1876).

We admit that the issuance of the subpoena by the court is an assertion of power. The order issuing the subpoena is a judicial act in conformity with the Walsh Act. A process is deemed issued when ordered by the court and ready for service. *McIntosh v. Standard Oil Co.,* 236 N. W. 152 (Neb. 1931); *Society v. Whitcomb,* 2 N. H.

227 (1820); *Smith v. Nicholson*, 5 N. D. 426, 67 N. W. 296 (1896). We assert that the *service* of the subpoena is simply notice the power has been exercised. We deny that the giving of notice thereof by the consul to a citizen abroad offends international law. We think the foregoing makes it unnecessary to show the applicability of the principles we have established, to the language of this Court in *Robertson v. Railroad Labor Board, supra,* and in *Michigan Trust Company v. Ferry, supra,* which are cited by the appellant. (B. 24.)

The carrying out of an order of court is an executive or ministerial function. A marshal in serving a subpoena, a summons, or in making an attachment or sale on execution, pursuant to order of court, is executing and administering the order from the court. He is classified in the executive branch of our government. Under Section 61 of the Restatement of the Law of Conflict of Laws, proposed final draft No. 1, of the American Law Institute, Comment D is:

> "When a court acts not to give a judgment but to affect directly a person or thing through the act of its officer it acts executively.
>
> *Illustration:*
>
> 3. The marshal of a court of equity by order of the court attaches a person for contempt. The state through the officer of the court is exercising executive jurisdiction."

The act of making the service of the subpoena upon an absent citizen pursuant to an order of court is one which the Congress could just as legally and lawfully have authorized the court to do through any private person. It is said in Comment b., under Section 62 of the said Restatement of the Law of Conflict of Laws:—

> "An act which has certain legal consequences if performed by a private person, has the same conse-

quences if performed by a public officer though outside the state of which he is an officer."

A subpoena is such a process that, except as required by statute, it could be served by a private person with equal validity as when served by an officer.

Cummings v. Akron Cement & P. Co., Fed. Cas. No. 3473 (1869);

Gordon v. Scott, Fed. Cas. No. 5620 (1868);

United States v. Mitchell, 223 F. 805, 807 (1915);

King v. Davis, 137 F. 198, aff'd 157 F. 676 (C. C. A. Va. 1906);

Whitehead v. Collingwood, 220 Mich. 504; 190 N. W. 239 (1922);

First Nat. Bank v. Estenson, 68 Minn. 28; 70 N. W. 775 (1897);

Hollandsworth v. Stone, 47 W. Va. 773; 35 S. E. 864 (1900);

Donaldson v. Winningham, 62 Wash. 212; 113 P. 285 (1911);

England Bros. v. Young, 26 Okl. 494; 110 P. 895 (1910).

And in Comment c, under said section 62 of said Restatement of the Law of Conflict of Laws, it is said:

"An act abroad which is to be done by a certain designated officer of the state is effective if so done, if it does not require for its effect the exercise in the other state of governmental power.

Illustration:

4. By statute commissioners are appointed to take testimony in a foreign state; they proceed to the foreign state, administer oaths, and take testimony. The proceeding is effective."

In 50 *C. J.* at page 544, it is said in Section 216:

"Statutes authorizing personal service on nonresident defendants out of the state usually provide

by whom such service may be made, and service, to be valid, must be made by the person *or officer* designated."

This indicates that a sovereign may empower *an officer* to make a service of a process of notification in a foreign state or nation without violating the sovereignty of the foreign state or nation or international law.

H. SERVICE BY A CONSUL IS VALID EVEN IF NO TREATY DEALS WITH THE SUBJECT.

The appellant argues—

"Congress has no power to authorize United States consuls to serve process except as permitted by treaty." (B. 24, 29-30; RB. 6-8.)

Appellant's argument is built upon the assumption that service of the subpoena by consul is equivalent to sending an officer of the United States "to round up absent citizens for return to service" (B. 30) and possibly upon the theory that there is something peculiar about a consul that requires everything he does be authorized by a treaty. (B. 29; RB. 6-8).

It seems plain to us that there is nothing peculiar about being a consul which precludes the man so appointed and recognized from doing any act not authorized by consular convention with the country with which accredited that any other officer or messenger of the United States could do. In other words if we have made clear in the foregoing portion of our brief that the United States has the power and right to send a messenger to France to deliver the subpoena without a treaty with France, then there is nothing within or without the scope of international law that requires a treaty before the United States can use one of its consuls for that service. Likewise if the authorities we cite under this heading show that a consul may be the medium of com-

municating a command or notice of recall, inferentially, the right to give such command or notice in the manner prescribed in the Walsh Act is not a violation of international law.

Again we call attention to our understanding of the appellant's position—that it is not the command or notice that is said to be objectionable under international law to an independent sovereign but it is the manner of communicating the command or notice. It is the manner of communicating the command or notice which must be examined to see if it is an exercise of judicial sovereignty within a foreign territory. How can the physical act of a man walking on foreign highways and handing and reading the contents of a paper to a citizen and tendering him money be, in the eyes of international law, an act of judicial sovereignty?

In *Dainese v. Hale,* 91 U. S. 13 (1875), cited by the appellant (B. 29) the consul undertook to seize property as upon attachment. No treaty authorized him to exercise such sovereign judicial power. Can appellant compare such plainly judicial conduct with carrying and delivering a command or notice?

In *Re Ross, Petitioner,* 140 U. S. 453 (1891), cited by appellant (B. 29) the court was considering the effect of constitutional limitations upon the procedure in a consular court. In holding court a consul exercises a sovereign judicial power which, of course, calls for consent of the sovereign where court is held. Merely telling a citizen that his country has called him home can not possibly interfere with the peace, dignity and independence of the foreign sovereign.

Wheaton's International Law, 8th Ed. Sec. 110, pages 176-177, is cited by the appellant (B. 30). *Wheaton* says that treaties are to authorize consuls—

"* * * to exercise, over their own countrymen jurisdiction within the territory of the State where they reside."

The consuls that served the subpoenas upon the appellant did not attempt to exercise jurisdiction over him. The jurisdiction over him was exercised by the court in the United States.

The appellant refers to language in the case of *Dainese v. Hale* and *Ross In re, supra,* and possibly elsewhere, that the powers of consuls depend upon treaty. Such language must be interpreted in the light of its context, the facts to which the mind of the court was directed. The general statements in the opinions of courts can easily be misapplied if one loses sight of the issues of the case. *Bramwell v. United States F. & G. Co.*, 269 U. S. 483, 489 (1926); *Pacific S. S. Co. v. Peterson*, 278 U. S. 130, 136 (1928); *Robertson v. United States*, 287 F. 942 (1923). The context of such statements is that a consul may not exercise jurisdiction over citizens unless authorized by treaty. No case is cited by the appellant nor can we find one holding that consuls may not serve their country and its citizens in ways that do not interfere with the peace, dignity and independence of the foreign sovereign to which accredited without a treaty. As a general statement, the language relied upon by the appellant is too limited, for consuls have all the rights and privileges accorded by international law as well as those accorded by treaty. In *Wharton on International Law* (1886) it is said at page 787:

"The rights and privileges of consuls rest on the general law of nations and on treaty."

In the reprint of the United States Consular Regulations of 1896, as amended to August 1, 1931 it is provided in section 77:

"The fundamental rights and privileges of consular officers depend upon the principles of international law and the customs and usages of nations. Certain rights and privileges are also specifically guaranteed to them by treaties."

In said regulations, Section 149, it is provided:

"The powers and duties of consular officers in regard to their fellow citizens depend in a great measure upon the municipal law of the United States. No civil or criminal jurisdiction can be exercised by them over their countrymen without express authority of law or by treaty stipulation with the state in which they reside."

Cunard S. S. Co. v. Mellon, 262 U. S. 100 (1923).

Several suits by steamship companies operating passenger ships between the United States ports and foreign ports were brought against officers of the United States to enjoin threatened application of certain provisions of the National Prohibition Act. We call attention to that portion of the opinion dealing with the suits by foreign corporations and their ships of foreign registry. The metaphor that a merchant ship is a part of the territory of the country whose flag she flies, came into question for application. The real principle was said to be one more of personal than of territorial sovereignty and not applicable when the ship is within foreign territorial waters:

"beyond what is affirmatively or tacitly permitted by the local sovereign." (123.)

It is said on page 124:

"A merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and

correlatively is bound to yield obedience to them. Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion."

Again on page 129 it is said:—

"*In so saying we do not mean to imply that Congress is without power to regulate the conduct of domestic merchant ships when on the high seas, or to exert such control over them when in foreign waters as may be affirmatively or tacitly permitted by the territorial sovereign; for it long has been settled that Congress does have such power over them. Lord v. Steamship Co.*, 102 U. S. 541; *The Abby Dodge*, 223 U. S. 166, 176."

Berizzi Bros. Co. v. S. S. Pesaro, 271 U. S. 562 (1926).

This was an appeal from a decree in admiralty dismissing a libel *in rem* against a ship owned and operated for trade purposes by the Italian Government. The Italian ambassador to the United States appeared and protested that the ship was immune from process of the Courts of the United States because of ownership by another sovereign. The opinion applies the doctrine of the *Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812), involving a foreign ship of war, to Merchant ships owned by foreign sovereigns, and we emphasize the following quoted in the opinion in the *Pesaro* case from the opinion in the *Exchange* case:

"'The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, *all sovereigns have consented to a relaxation, in practice, in cases under certain peculiar circum-*

stances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

"'*This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.*'" (Page 571)

* * *

"'This perfect equality and absolute independence of sovereigns, and *this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.*'" (Page 572)

Schooner Exchange v. McFaddon, 7 Cranch, 116 (1812), from which this Court quoted in its opinion in *Berizzi Bros. Company v. S. S. Pesaro, supra*, and extracts from which we have quoted, *supra*, is a case strongly relied upon by the appellant for his proposition that the United States can not exercise power extra-territorially. (B. 24.) The appellant admits, as aforesaid, that nations have extra-territorial jurisdiction of their own citizens, and the *Schooner Exchange* case, instead of being contrary to our proposition, illustrates the truth of it. The case involved a conflict of jurisdiction growing out of the very extra-territorial jurisdiction of France over its own citizens and ships, even while within our territorial limits. It holds that such extra-territorial jurisdiction of France can not be exercised in our domain without our express or tacit consent. The application of the holding to our case is that the United States has extra-territorial jurisdiction over the appellant by virtue of his citizenship, but that we can not exercise that jurisdiction in France without the express or tacit consent of France. We have shown that under the

Walsh Act no jurisdiction over the appellant was exercised in France and that the ministerial act of conveying notice to the appellant of the jurisdiction being exercised in the United States, is in accordance with the tacit consent of nations generally, and, therefore, with international law.

In the *Schooner Exchange* case, McFaddon and another filed a libel against the Schooner, then in the port of Philadelphia, alleging to be the owners of her. The Attorney General of the United States appeared, at the instance of the Secretary of State, pursuant to request by the Emperor of France through diplomatic channels, and suggested that the Schooner was an armed vessel of France and not subject to the ordinary judicial tribunals of this country. In the state of the evidence and proceedings, when the case was considered by this Court, it was assumed that the Schooner had been the property of the libelants but had been seized by the Emperor of France and placed in his armed service and had come into the port of Philadelphia on account of stress of weather. The reasoning of the opinion of this Court, as aforesaid, recognizes a conflict of jurisdiction, with the power in the United States to act as arbitrarily as it should chose, but that good faith under international law required the United States to withhold an exercise of its jurisdiction and allow the jurisdiction of France to prevail. The admission of the Schooner to our territory, in view of international law, implied our consent under the circumstances, to her withdrawal. Likewise, in view of the recognized power of a nation to recall its citizens, the admission by France of the appellant as a citizen of the United States, implied her consent that we withdraw the appellant in any way not violating the peace and integrity of France or interfering with her claims upon him or claims of her citizens against him. In other words,—

> "When private individuals of one nation spread themselves through another as business or caprice may direct, * * * it would be obviously inconvenient and dangerous to society * * * if such individuals or merchants did not owe temporary and local allegiance and were not amenable to the jurisdiction of the country."

But that does not negative unconflicting jurisdiction of the sovereignty of allegiance.

> "The preceding reasoning has maintained the propositions that all *exemptions* from territorial jurisdiction must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that, *when implied, its extent must be regulated by the nature of the case and the views under which the parties requiring and conceding it must be supposed to act.*"

(The preceding quotations are from the opinion in the *Schooner Exchange* case, pages *143 and *144.

The issue in the case at bar is not whether the appellant is exempt from the jurisdiction of France, but whether we have any jurisdiction over him as a citizen of this country, and whether what is done under the Walsh Act is, in view of the nature of such cases and "the views under which the parties requiring and conceding it (sovereignty) must be supposed to act," in harmony with the implied consent of nations generally.

Schibsby v. Westenholz, et al. (Eng. 1870) L. R. 6 Q. B. 155.

The plaintiff, a Dane, residing and doing business in France, sued the defendants, Danes residing and doing business in London, England, in a French court for damages for breach of contract and recovered judgment. This was a suit in England upon the French judgment. It appeared that the French law authorized an alien resident of

France to sue a foreigner by serving summons on the "Procureur Imperial."

> "The practice (not required) of the imperial government is, in such a case, to forward the summons thus served to the consulate of the country where the defendant is resident, with directions to intimate the summons, if practicable, to the defendant; * * * the French consulate in London served on the defendants a copy of the citation." (157)

The opinion does not intimate any treaty existed for such manner of service or that any question was raised or doubt entertained as to the right of consuls to make such service. The court held the French judgment unenforceable in England but—

> "If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them" (160).

Followed in *Rousillon v. Rousillon* (Eng. 1880) 14 Ch. D. 351, 371.

The last consular convention with France is the one of 1853, Senate Documents, Vol. 47, page 528. However Articles VIII and IX of this Convention were abrogated July 1, 1916, under notice given by the Government of the United States pursuant to the Act of Congress of March 15, 1921, generally known as the Seaman's Act. The Convention does not mention the right to use consuls to serve subpoenas or summons or the right of consuls to perform a myriad of other services to our government and its citizens. As would be expected the Convention deals only with such matters as might be considered an interference with the sovereignty of France. The great number of services performed by consuls not referred to in the convention serve to show that no treaty is considered necessary for such ministerial acts and that the tacit consent of nations to

permit our consuls to do the work is so generally recognized as to be a matter of international law.

We are advised by the present Secretary of State in a letter dated October 31, 1931, a copy of which has been furnished by us to opposing counsel that it has been the practice under Section 15 of the Naturalization Act of June 29, 1906 (34 Stat. 601), quoted in the opinion of this Court in *Luria v. United States,* 231 U. S. 9, at pages 19-21, to serve papers upon naturalized citizens whose certificates are sought to be cancelled, through our consuls and:

"such service has occurred in many cases without, so far as I am advised, any objections having been raised by foreign governments.

"I am of the opinion that comity among nations might well require that governments should raise no objection to the service upon their soil by consular officers of foreign countries on their own nationals of processes of court issued in such foreign countries.

* * *

"The Department of State is unaware of any case in which a government has objected to service upon its territory of the nature made by consular representatives of the United States in the Blackmer case.

"I share the view of the Court of Appeals of the District of Columbia in its decision of April 6, 1931 on the Blackmer case expressed in the following words:—

" 'So here, it is no offense to the dignity or right of sovereignty of France merely to notify an American citizen residing therein that he is wanted as a witness in a court of the United States. The consul who served the subpoena was not acting in his consular or diplomatic character, but as a mere messenger of the government of the United States. The act might as well have authorized the court to designate a messenger to serve the notice.' " (49 Fed. Rep. (2d) 523-533)

Consular regulations as amended as aforesaid, in Section 480, call attention to the absence in the consular regulations of authority of consuls to serve legal process such as subpoenas, citations and complaints in connection with cases pending in federal and state courts in the United States but Section 481 calls attention to two exceptions. The old consular regulations of 1870 permitted such services by consuls and said in Section 308 thereof:

> "In such cases the consular officer does not act in his quality as an agent of the federal government but simply as a citizen of the United States whose local position and character render him available to his fellow citizens for such services as might have been rendered by a private individual." (Page 66 of "Outlines of an International Code" by David Dudley Field)

Evidently the opinion developed that performance of such services by consuls in a wholesale fashion tended—

> "to result in the loss of prestige of the officer or employee who delivers the document as well as in the prestige of the consular service generally." (Note I Section 480 of the present Consular Regulations aforesaid.)

The two exceptions authorized in Section 481 are, first, the matter of service of papers in fraudulent naturalization cases under the said Act of June 29, 1906, (U. S. C. A., Title 8, Section 405) by which consular officers are required to render assistance in such cases and regulations provide in that respect in Section 481:

> "In view of this provision of law consular officers may properly assist in the delivery to designated persons of documents forwarded to them by duly authorized officials of United States courts and in such cases delivery may be made, where deemed advisable by a member of the consular staff."

The second exception is that consuls shall serve subpoenas and orders forwarded to them under the Walsh Act.

The United States has called upon its consuls to perform as we have said a myriad of services not agreed to in treaties. We will quote from *Hyde, International Law* (1922) page 828, Section 488 and reference to the notes of the latter will show that while some such services have been merely pursuant to the directions of the Secretary of State a great many have been pursuant to Acts of Congress. Such a general practice implies that there is tacit consent among nations, which is by virtue thereof a part of the international law, that consuls may render such ministerial services without the necessity of a treaty.

Hyde on International Law (1922) page 828, Section 488:

> "There are numerous duties, the performance of which by its consular officers is required by the appointing State, and which are rarely opposed by that other within whose domain they are undertaken. Concerning many the treaties are silent and diplomatic controversy infrequent. As questions relating to performance are chiefly confined to issues between consular officers and their own governments, they possess but slight international significance.
>
> "The United States, for example, finds its consular corps a valuable ally in protecting its own institutions, such as its customs revenue, its public health and its merchant marine. Thus, there is imposed upon American consular officers the duty to certify as to the correctness of invoices of merchandise to be imported into its territory. Such officers, as well as medical officers detailed for that service by the President, are utilized also for the purpose of issuing bills of health to vessels clearing from foreign ports for ports in the United States and of informing the Government through consular reports of the sanitary condition of foreign ports. For the protection of American ship-

ping and seamen, the statutory law of the United States imposes elaborate duties upon American consular officers in relation to the shipment and discharge of seamen, the recovery of wages and damages, provisions for crews, and relief of the destitute.

"To safeguard its citizenship, American consular as well as diplomatic officers in foreign countries are required by statute to furnish the Government of the United States from time to time with the names of those naturalized citizens within their respective jurisdictions who, within five years after the issuance of certificates of citizenship, have taken permanent residence in the country of their nativity or any other foreign country; as well as the names of those American citizens who have become naturalized in conformity with the law of a foreign State or who have made oath of allegiance thereto.

"To assist in checking the emigration to the United States of persons whose admission thereto is forbidden, American consular officers are required to report all information possible which will prevent the violation of the immigration laws, as well as violations by masters of vessels bound for the United States, of its laws regulating the transportation of emigrants.

"What is deemed to be an important function of American consular officers is the gathering and compiling of useful and material information and statistics calculated to promote the development of the foreign and domestic commerce of the United States, and relating particularly to mining, manufacturing, the shipping and fishery industries, labor interests and transportation facilities.

"Principal consular officers of the United States are instructed to keep at their offices a register of all American citizens residing in their respective districts, and therefore, to make it known that a register is kept, and to invite all resident Americans to cause their names to be entered therein. Such officers are authorized to issue certificates of registration for use with

the authorities of the place where the person registered is residing, and good for use for one year only. Such certificates upon expiration are capable of renewal. Consular officers are obliged to make returns to the American embassy or legation in the country in which the consulate is situated, as well as to the Department of State, of all registrations made and of all certificates of registration issued. It should be observed that American citizens resident abroad are required to register each year.

"Upon the outbreak of The World War the Department of State directed all consular officers in Europe to advise American citizens within their districts to register, and to give duplicate certificates of registration to all persons registered who did not bear passports. In case of emergency, certificates of registration were to be issued directly from consular agencies. Attention was later called to the fact that consular registration certificates should be issued only to native and naturalized American citizens and to citizens of the insular possessions. On May 20, 1915, the Department issued notice that 'American citizens who expect to make a prolonged stay in any foreign country should apply for consular registration to the American consulate in that country at or nearest the place in which they are sojourning.' The special duties imposed upon American consular officers with respect to passports after the United States itself became a belligerent in The World War have been observed elsewhere."

1. There is no allegation or proof by the appellant that France objects to, or the laws of France forbid, service of a subpoena by messenger or by consul.

We have shown that nations may and have tacitly consented that many acts may be done within their territorial limits by foreign nations. (*Cunard S. S. Co. v. Mellon* and *Berizzi Bros. Co. v. S. S. Pesaro, supra,* pages 78-79) They are acts which are so inoffensive as not to re-

quire express consent by treaty. They have therefore become a part of international law. While a nation may withdraw such tacit consent and thus render the international law inapplicable the appellant made no allegation and offered no evidence that France had withdrawn her tacit consent and changed the applicability of international law to our relations with her.

The manner of accomplishing the service of the subpoena, being the act in question and being a ministerial and non-judicial act in itself, is such an act as only France could object to since it is an act permissible under international law. If it were considered offensive to the sovereignty of France she would have to bring the matter to the attention of the court through our Secretary of State.

The *Pesaro* case, 255 U. S. 216 (1921);
Gul Djemal, The, 264 U. S. 90 (1923);
Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, 32 F. 2d 195, (1929). Certiorari denied 280 U. S. 579.

France has neither brought the matter to the attention of the court through our Secretary of State nor directly.

It is said in *American Banana Company v. United Fruit Co.*, 213 U. S. 347 (1909) at 356:

> "But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. *Slater v. Mexican National Railroad Co.*, 194 U. S. 120, 126."

If it were claimed by the appellant that the law of France, as distinguished from international law, forbids a messenger or consul of the United States to perform the service required by the Walsh Act, France, being a civil law country as this Court judicially knows, such law would be a defensive fact which the appellant could not raise with-

out allegation and proof. *Gerli & Co. v. Cunard, S. S. Co.*, 48 F. 2d. 115 (2d C. C. A, 1931); American Law Institute Restatement of the Law of Conflict of Laws, Proposed Final Draft No. 2, (a continuation of Proposed Final Draft No. 1) Sections 653-656. Such a statement of attitude of law on the part of France would be exceptional and the government is under no duty to negative exceptions. *Jelke v. United States*, 255 F. 264, 279 (7th C. C. A., 1918).

I. EVEN IF THE MANNER OF SERVING THE SUBPOENA WERE CONTRARY TO INTERNATIONAL LAW OR FRENCH LAW, THE WALSH ACT WOULD NOT BE UNCONSTITUTIONAL.

Since the Congress has jurisdiction under the Constitution to provide for the recall of an absent citizen, the means adopted by the Congress to accomplish the recall are not open to question in the courts of the United States, unless such means are, in themselves, contrary to some prohibition in the Constitution. In determining whether the means adopted by the Congress violate some constitutional prohibition, the courts will look to the Constitution and not to international law or the law of France or any other foreign nation. Likewise, in determining whether such means violate due process, the Court will consider only the fact as to whether personal service of notice in ample time, and with ample means with which to comply, comports with natural justice and the law of the land. It will not consider whether such means, although comporting with natural justice and the law of the land, violate international law or the law of some other nation.

A statute prescribing the manner of accomplishing the recall may be so violative of international law and the rights of some foreign nation as to justly provoke a protest of the foreign nation through diplomatic channels. But

that is not a concern of the courts,—it is a political question to be settled by the legislative and executive departments of our government. This is but a corollary of the often repeated statement of this Court that the judiciary has nothing to do with the justice, wisdom, policy or expediency of a law.

The Constitution provides in Article VI:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; * * *."

In *United States v. Siem*, 299 F. 582, (9th C. C. A. 1924), Circuit Judge Gilbert states in the opinion of the court at page 583:

> "We make no question of the power of Congress to enact that law, for neither existing treaties nor international law could divest Congress of the power, if it chose to exercise it, of requiring military service of such resident aliens, as international law is not in itself binding upon Congress, and treaties stand upon no higher plane than statutes of the United States."

In *The Over the Top*, 5 F. 2nd 838, (D. C. Conn. 1925), it is said in the opinion at page 842:

> "If we assume for the present that the national legislation has, by its terms, made the acts complained of a crime against the United States even when committed on the high seas by foreign nationals upon a ship of foreign registry, then there is no discretion vested in the federal court, once it obtains jurisdiction, to decline enforcement. International practice is law only insofar as we adopt it, and like all common or statute law, it bends to the will of the Congress. It is not the function of courts to annul legislation; it is their duty to interpret and by their judicial decrees to enforce it—and even when an act of Congress is declared invalid, it is only because the basic law is be-

ing enforced in that declaration. There is one ground only upon which a federal court may refuse to enforce an act of Congress and that is when the act is held to be unconstitutional. The act may contravene recognized principles of international comity, but that affords no more basis for judicial disregard of it than it does for executive disregard of it. These libels, therefore, cannot be attacked upon the ground that the territorial jurisdiction of the United States cannot be extended beyond the three-mile sea zone under international law."

In *The Nereide,* 9 Cranch 388 (1815), Mr. Chief Justice Marshall said, at pages *422-*423:

"It is not for its courts to interfere with the proceedings of the nation and to thwart its views. It is not for us to depart from the beaten track prescribed for us, and to tread the devious and intricate path of politics. Even in the case of salvage, a case peculiarly within the discretion of courts, because no fixed rule is prescribed by the law of nations, congress has not left it to this department to say whether the rule of foreign nations shall be applied to them, but has by law applied that rule. If it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. *Till such an act be passed,* the court is bound by the law of nations, which is a part of the law of the land."

The courts are not even at liberty to enforce the provisions of a treaty contrary to a subsequent act of Congress. If the political departments of the government see fit to modify or abrogate a treaty, although such action may constitute a breach of moral obligations, the courts have no power to prevent it or to declare the act of Congress unconstitutional. (38 *Cyc.* 974, paragraphs C and D.)

Not only would such action by the courts deny the declaration of the Constitution that it and the laws passed pursuant to it, are the supreme law of the land, but also such action would be contrary to international law itself, that each independent nation has a right to determine for itself what its laws shall be and an attempt to impose international law or the laws of any other nation would be a denial of the independence of this country.

One of the cases cited by the appellant, (B. 25) is *Bischoff v. Wethered,* 9 Wall. 812, (1869). It is cited by the appellant for his proposition that the United States has no personal jurisdiction of an absent alien. Also it is concerned with the circumstances under which a foreign judgment will be enforced in the courts of the United States. These matters are irrelevant to the cases at bar. We reserved reference to the case until this point because it supports our proposition as follows:

> "Whatever validity it (the English judgment) may have in England by virtue of statute law against property of the defendant there situate, it can have no validity here."

Grubel v. Naussauer, 210 N. Y. 149; 103 N. E. 1113 (1913) cited by the appellant, (RB. 15), also is concerned with the irrelevant problems concerning the enforcement of foreign judgments in the courts of the United States. With reference to this case, we refer to the comment in 27 *Harvard Law Review,* pages 464-6.

In presenting our answer to the appellant's point "A", we could have passed from the establishment of the conceded proposition that the United States has extra-territorial jurisdiction to legislate with respect to and to recall its absent citizens, to the proposition stated in this heading, last above, for no one will deny that, apart from international law, direct personal service of the "command" or notice of recall in any foreign nation, in ample

time and with ample means for compliance, and with an opportunity to be heard in defense before punishment for non-compliance, comports with natural justice and due process.

However, our answer has not been so limited because we believe we are supported by the great weight of authority and better reasoning in our belief that no feature of the Walsh Act violates international law. We do not think the Congress and the President of the United States, in passing and approving the Walsh Act, should be unnecessarily placed in the position of having acted contrary to international law or good faith among nations. But if there were no other alternative, the courts would, nevertheless, be constrained to sustain and enforce the Walsh Acts.

IV. ENFORCEMENT PROCEEDINGS ARE SUI GENERIS AND MAY BE QUASI IN REM AND AFFORD DUE PROCESS, (ANSWERING APPELLANT'S POINT B)

A. THE WALSH ACT DOES NOT LIMIT ENFORCEMENT TO QUASI IN REM PROCEDURE AND THESE CASES AT BAR WERE NOT ENTIRELY QUASI IN REM.

A court possesses inherent power to punish contempt of its process. That is to secure judicial authority from obstruction in the performance of its duties. The exercise of the power by inferior courts may be regulated, but not destroyed by statute. The Walsh Act first extends the jurisdiction of the court to subpoena a citizen as a witness and then extends and regulates the inherent power of the court to punish failure to respond to a subpoena.

The appellant's point "B" is: Even if the Congress could authorize the court to impose an obligation and duty upon him to respond to the subpoenas, the Congress could not authorize the Court to adjudicate a breach of such

duty upon *quasi in rem* procedure; that the Walsh Act limits enforcement to *quasi in rem* procedure; and, if the order to show cause is served abroad, it is void.

We contend that the Walsh Act does not limit enforcement to *quasi in rem* procedure and since the orders to show cause in the cases at bar were personally served upon the appellant abroad, the court had double barreled jurisdiction in these cases—(1) by the personal service, and (2), by the *quasi in rem* procedure, both authorized by the Act.

Concerning the jurisdiction pursuant to the service of the orders to show cause abroad satisfying due process, we rely upon our argument and the authorities cited in answering the appellant's point "A." We see no distinction between the power and right of the Congress to authorize the court to create the duty to respond to the subpoena and its power and right to authorize the court to adjudicate a breach of such duty upon service of notice abroad.

However, as *quasi in rem* procedure was complete in the cases at bar, and we believe valid apart from the successful effort to make personal service abroad, we do not stand on the validity of the jurisdiction pursuant to the personal service alone, but, after showing the Walsh Act does not limit enforcement to *quasi in rem* procedure, we will show that the *quasi in rem* procedure accords due process. Likewise, it seems to us, this Court may sustain the jurisdiction upon either view and not consider the other.

The Walsh Act, in section 3 (*supra*, page 4) makes it the duty of our consuls "when requested by the court or United States marshal" not only to serve subpoenas but also "to serve any orders to show cause, rules, judgments, or decrees." Then comes independent section 4 declaring the power of the court to order the subpoenaed witness

to show cause for his default. Section 5 is permissive. "Upon issuing such order the court *may* • • • direct" seizure of property to satisfy any judgment. In that event the procedure is to be as prescribed in sections 6 and 7.

To adopt the appellant's construction of the Act that sections 5 and 6 are the exclusive methods of proceeding, would be to imply that the recusant witness could avoid punishment by the simple expedient of removing his property from the United States and returning home where no consul could serve him.

B. GENERAL STATEMENT.

Punishment for failure to respond to a subpoena is to vindicate the authority of the court and is therefore "criminal contempt." The nomenclature is only to distinguish this type of contempt from "civil contempt" in which the punishment is for the benefit of a complaining private litigant. "Criminal contempt" is an "offense," subjecting the offender to punishment; but it is not a "crime." The punishment is penal, not criminal.

Both civil and "criminal" contempt proceedings are *sui generis*. "Criminal" contempt proceedings are subject to some of the incidents and requirements of a trial for an alleged crime. This is because such type of contempt is an offense and subjects the offender to a penalty and not because the offense is a "crime."

Since "criminal contempt" proceedings are fundamentally *sui generis*, no fixed formula of procedure is necessary under the Constitution. As aforesaid, the procedure may be regulated by statute. There is nothing to prevent the regulation from taking the form of provision for *quasi in rem* procedure. The appellant argues that if the procedure is *quasi in rem*, under the Walsh Act, it could not be *sui generis*, (B. 27). We can see no reason why the nature of the offense may not be *sui generis* or why the

procedure may not be *sui generis* to the extent not made *quasi in rem* by the Act. The procedure for acquiring jurisdiction may be *quasi in rem* and the incidents, so far as matters of formality are concerned, may be interpreted according to principles applicable to such *sui generis* proceedings. The Act is declaratory of inherent power of federal courts, except so far as novel procedure is expressly prescribed.

Under such *sui generis* and *quasi in rem* procedure, the offender is accorded due process, if he is clearly informed in advance of the charge which he must meet, is given a hearing before a competent court that accords with natural justice, and is given an opportunity to be represented by counsel.

The procedure prescribed by the Walsh Act meets all of the foregoing requirements:

1. It affords notice to the offending or recusant witness;

2. It provides for a hearing before a court of competent jurisdiction;

3. The hearing afforded is in accord with common law standards of natural justice;

4. The witness is not precluded from being represented by counsel or from calling witnesses.

The appellant argues that *quasi in rem* procedure, involving preliminary seizure of "non-offending property," is authorized by the Walsh Act; whereas, the "action is in fact *in personam*" for the reason that when the sentence is satisfied out of the property *in custodia legis*, the finding of guilty of contempt will still remain upon the court records as a cloud upon the citizen's good name. (B. 30-32; RB. 30-31.)

These actions against the appellant were no more *in personam* and no less against "offending property" than in previously familiar types of actions *quasi in rem*, such

as actions in state courts, pursuant to state statute, in which property of an absconding or non-resident debtor is seized to satisfy any judgment that may be rendered. In such cases, the property seized is not "offending property." In such cases, the court must first determine that the duty exists. At the trial the first question will be *in personam*, but if that question is determined in favor of the plaintiff, the determination will have no effect beyond the property attached. (See the quotation from *Cooper v. Reynolds*, 10 Wall. 308, 318, (1870) *supra*, p. 62; and see *Freeman v. Alderson*, 119 U. S. 185) (1886). In such cases the determination of the principal question, the indebtedness of the defendant, is *in personam*, and will always remain upon the records of the court as a blight upon the name of the defendant in not having paid his debts. If, under the Walsh Act, the court has no jurisdiction to render a finding of guilty of contempt that will be effective beyond the value of the property *in custodia legis*, such resulting condition is not so incongruous as to render the Act unconstitutional. So the appellant's argument that the action is in fact *in personam* with *quasi in rem* procedure is a misnomer, or, if not a misnomer, within the power of the Congress.

Finally the appellant argues—

> "Moreover, in federal courts, despite contrary legislation of Congress and contrary state practice, *quasi in rem* procedure is not used to acquire jurisdiction." (B. 32.)

If the appellant's statement had been that in federal courts, despite contrary state practice, *quasi in rem* procedure is not used to acquire jurisdiction, we would agree. But the statement of the appellant that in federal courts, despite contrary legislation of *Congress, quasi in rem* procedure is not used to acquire jurisdiction, is wrong and the opposite is held in every case he cites. We know of no

"contrary legislation of Congress" prior to the Walsh Act, but the opinions of this Court in the cases cited by the appellant include as reasoning and not as mere *dicta*, statements that Congress could provide for the use of *quasi in rem* procedure to acquire jurisdiction.

C. "CRIMINAL" CONTEMPT PROCEEDINGS ARE SUI GENERIS AND NOT TO CONVICT OF A CRIME. DUE PROCESS THEREIN IS SATISFIED UNDER THE WALSH ACT.

Since one of the premises in the argument of the appellant in support of his point "B," is that trial under the Walsh Act is for a "personal criminal offense" (B. 31; RB. 30) and "is a crime" (RB. 29), we will at the outset refer to the authorities establishing that "criminal contempt" is not a crime "within the Sixth Amendment or common understanding," but is *sui generis*. The same premise is involved in the appellant's point "E," so, to avoid repetition, we will at this place consider the authorities upon which he relies in support of that premise under his point "E" as well as under his point "B."

Criminal contempt proceedings are penal and for the punishment of an offense to such an extent that they are, in some respects, analogous to criminal proceedings. But in many other respects the proceedings are not even analogous. They are analogous to such an extent that they have been called *quasi* criminal; but this Court has very recently held, in a case involving a statute quite as regulatory as the Walsh Act, "that since the foundation of our government, proceedings to punish such offenses have been regarded as *sui generis* and not criminal prosecutions within the Sixth Amendment or common understanding." (*Infra*, page 111.)

Also, very recently, this Court re-affirmed an early definition of due process in criminal contempt cases not

committed in open court, as being satisfied if the accused is advised of the charges and has a reasonable opportunity to meet them by way of defense or explanation, including the assistance of counsel and the right to call witnesses. (*Infra,* page 114.)

Being *sui generis,* contempt procedure and forms are liberal. The charges need not be in any particular form, and, apart from statute, need not be served upon the accused in any particular way, provided they are sufficient to enable him to prepare and present his defense. (*Infra,* pages 102, 105, 114.)

Gompers v. Buck's Stove and Range Company, 221 U. S. 418 (1911).

This case was decided upon *certiorari* to review the decision reported at 33 App. D. C. 516. In the case of *American Federation of Labor, et al. v. Buck's Stove and Range Company,* (33 App. D. C. 83 (1909)), the Federation and Gompers were enjoined from boycotting the Stove Company. While the defendant's appeal was pending, this proceeding in contempt for violation of the injunction was commenced in the equity case and Gompers and two others found guilty. This adjudication was appealed without incorporating the evidence in a bill of exceptions. The Stove Company moved to dismiss the appeal on the ground that it was a criminal proceeding and governed by practice applicable to law cases so that the appellate courts were bound by the findings of fact of the courts below. It is said in the opinion of this Court, at page 441:

> "Where results so controlling depend upon proper classification, it becomes necessary carefully to consider whether this was a case at law for criminal contempt, where the evidence could not be examined, for want of a bill of exceptions; or a case in equity for civil contempt, where the whole record may be examined on appeal and a proper decree entered."

*"Contempts are neither wholly civil or altogether criminal. * * * 'It may partake of the characteristics of both.'"*

It is said "that civil contempt is remedial for the benefit of the complainant" and "criminal contempt" "is punitive to vindicate the authority of the court." The opinion proceeded on page 444:

> "Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself."

This Court concluded this was a civil contempt proceeding and, since the case out of which it grew had been settled, dismissed the contempt proceedings without prejudice to the bringing of "criminal contempt" proceedings.

Criminal contempt proceedings were brought and were decided by the Court of Appeals of the District of Columbia under the caption *"Re Gompers,"* 40 App. D. C. 293, (1913). Mr. Justice Van Orsdell, in delivering the opinion of the Court of Appeals, discussed criminal contempt as follows, pages 322-323:

"In the decisions, the courts have expressed a variety of views as to the nature of the action for the punishment of contempts. Some have held it to be a criminal proceeding, in that a penalty is attached; some have held it to be in the nature of a criminal proceeding. Penalty and punishment are not alone sufficient to distinguish the proceeding as criminal. The action is sui generis, in a class by itself, partaking of some of the elements of both civil and criminal proceedings, but, strictly speaking, it is neither. It belongs to a class of proceedings inherent in the court, and deemed essential to its existence. It would hardly be held that a disbarment proceeding is criminal, although a severe penalty may be imposed; or that the power of a court to reprimand its officers for miscon-

duct is a criminal proceeding, though the penalty imposed is humiliating and severe. These belong to a class of proceedings essential to the self-preservation of a court, and inherent in all courts, irrespective of their constitutional and statutory jurisdiction. *Contempt, therefore, is without any particular form of action, and not subject to the limitations of procedure prescribed for the conduct of either civil or criminal actions. While Congress has the power to declare an act in contempt of court a crime, it has never exercised this power.* The power of the Federal Courts to commit and punish for contempt is inherent in the court where the contempt occurs. *Ex parte Terry,* 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. Rep. 77. As was said in *Watson v. Williams,* 36 Miss. 331:

> 'The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and coexisting with them by the wise provisions of the common law.'

This statement of the law is quoted with approval in *Re Debs,* 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900. It is idle to assert that the power to punish for contempt of court is inherited from the common law. The power was inherent in the courts of the United States from their creation, and exists by virtue of their creation. It is not dependent upon precedent, origin, or custom, but would exist if this power had never been exercised by the courts of England. Section 725, Rev. Stat. U. S. Comp. Stat. 1901, p. 583, *merely limits the inherent power of all courts of the United States to punish acts in contempt of their authority, and prescribes the punishment that may be inflicted. Pierce v. United States,* 37 App. D. C. 582; *Anderson v. Dunn,* 6 Wheat., 204, 5 L. ed. 242; *Ex parte Robinson,* 19 Wall., 505, 22 L. ed. 205; *Eilenbecker v. District Ct.,* 134 U. S. 31, 33 L. ed. 801, 10 Sup. Ct. Rep. 424."

Gompers v. United States, 233 U. S. 604, (1914).

The Court of Appeals having affirmed the conviction of Gompers for criminal contempt (40 App. D. C. 293, *supra*), this Court granted certiorari and reversed the judgment upon the ground that the offense was barred by the Statute of Limitations providing—

> "No person shall be prosecuted, tried, or punished for any *offense* not capital, * * * unless the indictment is found * * * within three years next after such offense shall have been committed." (607.)

It is said in the opinion:

> "It is urged in the first place that contempts cannot be crimes, because, although punishable by imprisonment, and therefore, if crimes, infamous, they are not within the protection of the Constitution and the amendments giving a right to trial by jury, etc. to persons charged with such crimes. * * * It does not follow that contempts of the class under consideration are not crimes, *or rather, in the language of the statute, offenses,* because trial by jury * * * has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure. (610-611.)
>
> "Even if the statute does not cover the case by its express words, as we think it does, still, in dealing with the punishment of crime a rule should be laid down, *if not by Congress,* by this court. The power to punish for contempt must have some limit in time, and in defining that limit we should have regard to what has been the policy of the law from the foundation of the government. *By analogy, if not by enactment, the limit is three years.* (612.)

"The result is that the judgments, based as they are mainly upon offenses that could not be taken into consideration; must be reversed." (612.)

Hudgings, Ex Parte, 249 U. S. 378 (1919).

The petitioner was punished for contempt of court because of perjury. In discharging the petitioner on habeas corpus proceedings, Chief Justice White reviewed the power of a court to punish for contempt as follows (pp. 382-384):

"That the contumacious refusal of a witness to testify may so directly obstruct a court in the performance of its duty as to justify punishment for contempt is so well settled as to need only statement. Despite some confusion caused by certain ambiguous forms of expression used by the court below in dealing with the subject, it is indisputable that the punishment for contempt was imposed solely because of the opinion of the court that the witness was wilfully refusing to testify truthfully, that is, was committing perjury.

Whether, then, power to punish for contempt exists in every case where a court is of the opinion that a witness is committing perjury, is the test we must here apply. Because perjury is a crime defined by law and one committing it may be tried and punished does not necessarily establish that when committed in the presence of a court it may not, when exceptional conditions so justify, be the subject-matter of a punishment for contempt. For an application of this doctrine to perjury, see *Berkson v. People,* 154 Illinois 81; *In re Rosenberg,* 90 Wisconsin 581; *Stockham v. French,* 1 Bing. 365; and see *In re Schulman,* 177 Fed. Rep. 191; *In re Steiner,* 195 Fed. Rep. 299; *In re Ulmer,* 208 Fed. Rep. 461; *United States v. Appel,* 211 Fed. Rep. 495. This being true, we must ascertain what is the essential ingredient in addition to the elements constituting perjury under the general law which must be found in perjury when committed in the presence of a court to bring about the exceptional conditions justifying punishment under both.

Existing within the limits of and sanctioned by the Constitution, the power to punish for contempt committed in the presence of the court is not controlled by the limitations of the Constitution as to modes of accusation and methods of trial generally safeguarding the right of the citizen. This, however, expresses no purpose to exempt judicial authority from constitutional limitations, since its great and only purpose is to secure judicial authority from obstruction in the performance of its duties to the end that means appropriate for the preservation and enforcement of the Constitution may be secured. *Toledo Newspaper Co. v. United States*, 247 U. S. 402; *Marshall v. Gordon*, 243 U. S. 521.

An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being, true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted—a principle which, applied to the subject in hand, exacts that in order to punish perjury in the presence of the court as a contempt there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty. As illustrative of this, see *United States v. Appel*, 211 Fed. Rep. 495. It is true that there are decided cases which treat perjury, without any other element, as adequate to sustain a punishment for contempt. But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing. If the conception were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully the power would result to impose a punishment for contempt with the object or purpose of exacting from the witness a character of testimony which the court would deem to be truthful; and thus

it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in a court would be gravely imperiled."

Myers v. United States, 264 U. S. 95 (1924).

The plaintiffs in error were fined and imprisoned for their contumacious disobedience of an injunction. The proceeding was brought under the Clayton Act of 1914; and on appeal the jurisdiction of the trial court was challenged upon the ground that the contumacious acts occurred in another division of the district. In affirming the judgment Mr. Justice McReynolds discussed contempt proceedings as follows:

(p. 103) "None of the cited Code sections makes specific reference to contempt proceedings. These are *sui generis*—neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms —and exertions of the power inherent in all courts to enforce obedience, something they must possess in order properly to perform their functions. *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 326.

"*To disobey a judicial order is not declared criminal by the Clayton Act. It recognizes that such disobedience may be contempt and, having prescribed limitations, leaves the court to deal with the offender.* While it gives the right to trial by jury and restricts the punishment it also clearly recognizes the distinction between 'proceeding for contempt' and 'criminal prosecution.' 'No proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts.' Sec. 25.

"The Clayton Act says nothing about venue in contempt proceedings; leaves it as theretofore. The power of the court below to issue the enjoining order is not questioned. By disobeying the order, plaintiffs in error defied an authority which that tribunal was

required to vindicate. *It followed established practice, as modified by the statute;* and we think the objections to its jurisdiction are unsubstantial."

* * * * *

(pp. 104-105) "*Gompers v. United States,* 233 U. S. 604, does not support the claim that the challenged contempt proceedings amounted to prosecution for a criminal offense within the intendment of Sec. 53, Judicial Code. *While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offenses have been regarded as sui generis and not 'criminal prosecutions' within the Sixth Amendment or common understanding.*"

See also: *United States v. Zucker,* 161 U. S. 475 (1896);

Michaelson v. United States, 266 U. S. 42 (1924).

In upholding the constitutionality of those provisions of the Clayton Act which require a jury trial in certain specified kinds of contempt,—

> "if such act or thing be of such character as to constitute also a criminal offense under any statute of the United States or law of any state in which the act is committed," (Opinion, page 64)

it must be borne in mind that by virtue of the statute, "the act or thing charged must be of such character as also to constitute a crime" and then by virtue of the statute "prosecution must be in conformity with the practice in criminal cases." (Opinion, page 65.)

Mr. Justice Sutherland reviewed at length the federal decisions upholding the inherent power of courts to punish for contempts and concluded that the jury trial provisions of the Clayton Act did not abrogate or render practically inoperative that power. The following language is from the opinion (pp. 65-67):

"But it is contended that the statute materially interferes with the inherent power of the courts and is therefore invalid. That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior federal courts are concerned, however, it is not beyond the authority of Congress (*Ex parte Robinson*, 19 Wall. 505, 510-511; *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 326); but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative. That it *may be regulated within limits not precisely defined may not be doubted. The statute now under review is of the latter character.* It is of narrow scope, dealing with the single class where the act or thing constituting the contempt is also a crime in the ordinary sense. It does not interfere with the power to deal summarily with contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice, and is in express terms carefully limited to the cases of contempt specifically defined. Neither do we think it purports to reach cases of failure or refusal to comply affirmatively with a decree—that is to do something which a decree commands—which may be enforced by coercive means or remedied by purely compensatory relief. If the reach of the statute had extended to the cases which are excluded a different and more serious question would arise. But the simple question presented is, whether Congress may require a trial by jury upon the demand of the accused in an independent proceeding at law for a criminal contempt which is also a crime. *In criminal contempts, as in criminal cases,* the presumption of innocence obtains. Proof of guilt must be beyond reasonable doubt and the defendant may not be compelled to be a witness against himself, *Gompers v. Bucks Stove & Range Co., supra,* p. 444.

The fundamental characteristics of both are the same. Contempts of the kind within the terms of the statute partake of the nature of crimes in all essential particulars. 'So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, 3 *Transactions of the Royal Historical Society*, N. S. p. 147 (1885), and that at least in England it seems that they still may be and preferably are tried in that way.' *Gompers v. United States*, 233 U. S. 604, 610-611.

This is also pointed out by counsel in the case of *O'Shea v. O'Shea and Parnell*, L. R. 15 Prob. Div. 59, 61; and, in the course of one of the opinions in that case, it is said (p. 64):

> 'The offense of the appellant (criminal contempt) is certainly a criminal offense. I do not say that it is an indictable offense, but, whether indictable or not, it is a criminal offense, and it is an offense, and the only offense that I know of, which is punishable at common law by summary process.'

The proceeding is not between the parties to the original suit but between the public and the defendant. The only substantial difference between such a proceeding as we have here, and a criminal prosecution by indictment or information is that in the latter the act complained of is the violation of a law and in the former the violation of a decree. In the case of the latter, the accused has a constitutional right of trial by jury; while in the former he has not. The statutory extension of this constitutional right to a class of contempts which are properly described as 'criminal offenses' does not, in our opinion, invade the powers of the courts as intended by the Constitution or violate that instrument in any other way."

Grossman, Ex Parte, 267 U. S. 87 (1925).

This was an original habeas corpus proceeding to try the constitutionality of the petitioner's confinement notwithstanding a pardon granted by the President. The peti-

tioner was fined and sentenced for having disobeyed a temporary injunction issued under the Prohibition Act forbidding illicit traffic in liquors on certain premises. The President issued a pardon commuting the sentence to a fine upon condition that the fine was paid, which was done. Having been thereupon released from custody, the petitioner was again committed by the district court upon the ground that the pardon was ineffectual. In discharging the petitioner from custody the Supreme Court, speaking through Mr. Chief Justice Taft, reviewed at length the law of criminal contempts and sustained the power of the president to pardon a criminal contempt in the following language:

> (p. 111) "In our own law the same distinction clearly appears. *Gompers. v. Bucks Stove & Range Company,* 221 U. S. 418; *Doyle v. London Guarantee Company,* 204 U. S. 599, 607; *Bessette v. Conkey Co.,* 194 U. S. 324; *Alexander v. United States,* 201 U. S. 117; *Union Tool Co. v. Wilson,* 259 U. S. 107, 109.
>
> In the *Gompers* case this Court points out that it is not the fact of punishment but rather its character and purpose that makes the difference between the two kinds of contempts. For civil contempts, the punishment is remedial and for the benefit of the complainant, and a pardon cannot stop it. For criminal contempts the sentence is punitive in the public interest to vindicate the authority of the court and to deter other like derelictions. * * *
>
> (pp. 115-116) Nothing in the ordinary meaning of the words 'offenses against the United States' excludes criminal contempts. That which violates the dignity and authority of federal courts such as an intentional effort to defeat their decrees justifying punishment violates a law of the United States (*In re Neagle,* 135 U. S. 1, 59, *et seq.*), and so must be an offense against the United States. Moreover, this Court has held that the general statute of limitation which forbids prosecutions 'for any offense unless instituted within three

years next after such offense shall have been committed,' applies to criminal contempts. *Gompers v. United States*, 233 U. S. 604. In that case this Court said (p. 610): (See *supra*, p. 103.)

(pp. 117-118) The argument is that the word 'offenses' is used in the Constitution interchangeably with crimes and criminal prosecutions. But as has been pointed out in *Shick v. United States*, 195 U. S. 65, the term 'offenses' is used in the Constitution in a more comprehensive sense than are the terms 'crimes' and 'criminal prosecutions.'

In *Myers v. United States*, 264 U. S. 95, 104, 105, *we have but recently held that 'while contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our Government proceedings to punish such offenses have been regarded as sui generis and not criminal prosecutions within the Sixth Amendment or common understanding.' Bessette v. Conkey Co.*, 194 U. S. 324, 326. Contempt proceedings are *sui generis* because they are not hedged about with all the safeguards provided in the bill of rights for protecting one accused of ordinary crime from the danger of unjust conviction. This is due, of course, to the fact that for years before the American Constitution, courts have held to be inherently empowered to protect themselves and the function they perform by summary proceeding without a jury to punish disobedience of their orders and disturbance of their hearings. So it is clear to us that the language of the Fifth and Sixth Amendments and of other cited parts of the Constitution are not of significance in determining the scope of pardons of 'offenses against the United States' in Article II, Section 2, clause 1, of the enumerated powers of the President. We think the arguments drawn from the common law, from the power of the King under the British Constitution, which plainly was the prototype of this clause, from the legislative history of the clause in the Convention, and from the ordinary meaning of its words, are much more relevant and convincing."

Cooke v. United States, 267 U. S. 517 (1925).

Cooke was sentenced to thirty days' imprisonment for contempt in writing a highly libellous letter to a United States Judge on the day following a trial in which a verdict had been rendered against his client. The court and Judge were at that time engaged in another trial. Eleven days later, the court issued an order for the attachment of Cooke, who was arrested and brought before the court. Upon admitting the authorship of the letter, the court pronounced him guilty of contempt and forthwith sentenced him, as above, without allowing Cooke to secure and consult counsel, prepare his defense and call witnesses or to make a personal explanation.

Upon appeal, the Supreme Court reversed the judgment and remanded the case for a further hearing. Chief Justice Taft stated in the opinion (pp. 534-535):

> "To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law. Such a case had great consideration in the decision of this Court in *Ex parte Terry*, 128 U. S. 289. It was there held that a court of the United States upon the commission of a contempt in open court might upon its own knowledge of the facts without further proof, without issue or trial, and without hearing an explanation of the motives of the offender, immediately proceed to determine whether the facts justified punishment and to inflict such punishment as was fitting under the law.
>
> The important distinction between the *Terry* case and the one at bar is that this contempt was not in

open court. This is fully brought out in *Savin, Petitioner*, 131 U. S. 267. The contempt there was an effort to deter a witness, in attendance upon a court of the United States in obedience to a subpoena, while he was in a waiting room for witnesses near the court room, from testifying, and the offering him money in the hallway of the courthouse as an inducement. This was held to be 'misbehavior in the presence of the Court' under Sec. 725 R. S. (now Sec. 268 of the Judicial Code). The Court, speaking by Mr. Justice Harlan, said (page 277):

We are of opinion that, within the meaning of the statute, the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court. It is true that the mode of proceeding for contempt is not the same in every case of such misbehavior. Where the contempt is committed directly under the eye or within the view of the court, it may proceed 'upon its own knowledge of the facts and punish the offender, without further proof, and without issue or trial in any form,' *Ex parte Terry*, 128 U. S. 289, 309; whereas, in cases of misbehavior of which the judge can not have such personal knowledge, and is informed thereof only by confession of the party, or by testimony under oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished. 4 Bl. Com. 286." • • •

(pp. 536-537):

"When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and argument. The exact form of the procedure in the prosecution of such contempts is not important. The Court in *Randall v. Brigham*, 7 Wall., 523, 540, in speaking of what was necessary in proceedings against an attorney at law for malpractice said:

'All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation.'

The Court in *Savin, Petitioner,* 131 U. S. 267, applied this rule to proceedings for contempt:

Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed. See *Hollingsworth v. Duane,* 12 Fed. Cases 359, 360; *In re Stewart,* 118 La. 827; *Ex parte Clark,* 208 Mo. 121."

Schwartz v. United States, 217 Fed. 866 (C. C. A. 4th Cir., 1914).

In affirming a conviction for criminal contempt in violating a strike injunction (the proceeding having commenced with a rule to show cause), Circuit Judge Woods held (p. 868):

"But, aside from that, the original petition and affidavits, as we have pointed out, contained distinct and definite charges against him, and the order suspending his trial on these charges did not affect his liability to answer them. Under that order making the United States a party, transferring the cause to the criminal docket, and directing the original petition and affidavits to be filed in the criminal proceeding, the charges and specifications contained in the original papers stand against the defendant as the basis of the

criminal proceedings. *There is no fixed formula for contempt proceedings, and technical accuracy is not required. It is sufficient if the offense is set out, so that the defendant is clearly informed of the charges against him and whether a criminal or civil contempt is alleged; and this is to be determined by examination of the entire record. Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874; *Acron v. United States*, 155 Fed. 833, 84 C. C. A. 67; *United States v. Huff* (D. C.), 206 Fed. 700.''

Armstrong, et al. v. United States, 18 Fed. (2nd) 371 (C. C. A. 7th Cir., 1927).

Contempt proceedings were here brought against the defendants for violating a strike injunction. The sufficiency of the information was attacked for duplicity and indefiniteness. In sustaining the conviction, Circuit Judge Anderson held (pp. 372-373):

"(2) (a) The contention that the information is bad for duplicity is without merit. As stated by the Supreme Court in *Myers v. United States*, 264 U. S. 95, 44 S. Ct. 272, 68 L. Ed. 577, *contempt proceedings 'are sui generis—neither civil actions nor prosecutions for offenses,* within the ordinary meaning of those terms.' The cases cited by plaintiffs in error in support of this contention deal with indictments in criminal cases and are not in point. *'There is no fixed formula for contempt proceedings, and technical accuracy is not required.' Schwartz v. U. S.* (C. C. A.) 217 F. 866; *Scoric v. U. S.* (C. C. A.) 217 F. 871.

(3) Upon the question as to the sufficiency of the information, it is enough to say that there was filed with it, and attached to and made a part of it by proper averments, the injunction order of the court and the affidavits of three persons setting forth facts constituting violations of the order. In the information thus considered there is set forth the injunction and the acts constituting its violation. The acts charged amount to

clear violations of the injunction. In apt words it is averred that the plaintiffs in error conspired to do, and did, things which the injunction prohibited; that they conspired to commit, and committed, acts which it forbade. The information charged that plaintiffs in error willfully disobeyed an injunction lawfully issued in an equity cause then pending. It was sufficient, and the motion to quash was properly overruled."

We also cite:

Merchants Stock & Grain Co. v. Board of Trade, 201 F. 20, (8th C. C. A., 1912);

Hansen v. United States, 1 F. 2d, 316 (7th C. C. A., 1924);

Bowles v. United States, 50 F. 2d, 848, 852 (4th C. C. A., 1931);

Debs, In re, 158 U. S. 564, 594 (1895).

The mere fact that the type of contempt involved in the cases at bar has come to be commonly known as "criminal contempt," does not change the essential or legal nature of the offense or the proceedings, except in so far as, for reasons of policy, the courts have chosen to rely, in some respects, upon the analogy of criminal proceedings.

United States v. La Franca, 282 U. S. 568 (1931).

This was an action to recover "taxes" based upon illegal sales of liquor in violation of the National Prohibition Act. The applicability and interpretation of the Willis-Campbell Act was involved and it was contended that the so-called "taxes" were "penalties." It is said in the opinion:

"No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such. That the exaction here in question is not a true

tax, but a penalty involving the idea of punishment for infraction of the law, is settled * * *." (572)

Huntington v. Attrill, 146 U. S. 657 (1892).

On error to Maryland state court the judgment dismissing a suit in equity was reversed. The bill was by Huntington to set aside a transfer of stock as in fraud of creditors and to charge the stock with payment of a judgment against Attrill upon his statutory liability as a director of a New York corporation. Huntington had recovered the judgment in New York state courts upon the ground that Attrill had sworn falsely that the capital of the corporation was fully paid. It was argued that the judgment was for a penalty and that Maryland courts should lend their aid to enforcement of penalty statutes of New York. The Supreme Court held that whether a law is "penal" in the international sense "depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act." In that sense this proceeding is "penal" but still it is not a "crime." And we are not asking any other nation to enforce a "penal" law of the United States.

The "essential nature" of punishment for contempt is penal, not criminal.

The foregoing cases clearly establish that the courts of the United States enjoy the inherent right and power to punish for contempt; that procedure may be regulated by the Congress; that "criminal contempt" proceedings are *sui generis* and not for the punishment of a "crime"; that the Walsh Act is declaratory except as it extends the jurisdiction of the court and regulates procedure; that established principles of jurisdiction and practice may prevail except as modified by the Act, and that except as modified by the Act, no fixed formula of procedure is necessary. It is sufficient that the procedure, as regulated by the Act,

does not deny due process. There is nothing in the nature of the offense which precludes the use of *quasi in rem* procedure.

D. THE CONGRESS MAY AUTHORIZE FEDERAL COURTS TO USE QUASI IN REM PROCEDURE TO ACQUIRE JURISDICTION.

In so far as the appellant's argument, in support of his point "B," is based upon his theory that courts of the United States can not acquire jurisdiction pursuant to extra-territorial service of process, we rely upon our answer to his Point "A." We are now addressing ourselves to his contention that the Congress can not authorize *quasi in rem* procedure, which, of course, involves an adjudication of a personal obligation.

The appellant correctly states (RB. 26), that the Walsh Act, in its *quasi in rem* procedure, does not mandatorily require successful personal service upon the accused, of the citation to show cause, as a condition precedent to trial and adjudication. It does require an effort to obtain such personal service, but it was undoubtedly recognized that the accused might hide so that personal service of the citation could not be made. Therefore, all that the Act mandatorily requires in the *quasi in rem* procedure, prior to trial and adjudication, is seizure of property and service of citation by publication. (Sections 5 and 6 of the Act.)

The cases cited by the appellant show that attempts have been made in the federal courts to sustain jurisdiction acquired by the *quasi in rem* procedure of attachment, based upon two types of acts of Congress, in which cases the jurisdiction was denied, not because Congress could not confer jurisdiction acquired in such manner, the court expressly reasoning that Congress could, but for the reason that the statutes relied upon were interpreted as not intending to confer jurisdiction acquired in such manner.

The first Act of Congress, which has been relied upon, is the Conformity Act. *Toland v. Sprague*, 12 Pet. 300, (1838) (B. 32), holds that the adoption of state forms and practice does not mean adoption of state means of acquiring jurisdiction, and, as aforesaid, reasons that such means of acquiring jurisdiction would have to be pursuant to legislation of Congress for that purpose. (*Supra*, page 67.)

Laborde v. Ubarri, 214 U. S. 173 (1909) (B. 32), holds that in federal courts, attachment is but an incident and not a means of acquiring jurisdiction, obviously because of an absence of necessary legislation by Congress. The distinction between conformity to state practice, pleadings, forms and modes of proceeding and jurisdiction is well brought out in *Western Loan & Savings Company v. Butte Mining Company*, 210 U. S. 368 (1908), and *McNeal-Edwards Company v. Young Company*, 42 F. 2d, 362, 367 (1930), reversed 283 U. S. 398 (1931 preliminary print).

The second Act of Congress which has been relied upon, is the Act of March 3, 1887 (24 Stat. 552, c. 373, as amended August 13, 1888, 25 Stat. 433, c. 866). This was in the *Big Vein Coal Company v. Read*, 229 U. S. 31 (1912) (B. 32). This Court held the statute of 1888 was not properly interpretable as changing the rule, but said, page 38:

> "If Congress had intended any such radical change, *it would have been easy to have made provision for that purpose and doubtless a method of service by publication in such cases would have been provided.*"

E. SERVICE BY PUBLICATION IN ACTIONS QUASI IN REM IS SUFFICIENT FOR DUE PROCESS.

The appellant argues that under Sections 5, 6 and 7 of the Walsh Act, publication of the order to show cause, after seizure of property of the defaulting witness, is all that is mandatory. Section 6 of the Act requires an effort to make personal service of the order to show cause, but

does not require that such effort be successful before trial can be had. In these cases, personal service was had upon the appellant. But appellant argues that there may be a case in which trial is had pursuant to attachment and service by publication only and that such a case would not be in accordance with due process for want of sufficient or any legal notice to the accused.

Passing over the right of the appellant to raise the question in this case, in view of the personal service which was had upon him, we submit that service by publication, pursuant to attachment, is sufficient in actions *quasi in rem* to satisfy due process.

Undoubtedly most of the states have statutes authorizing suits against non-residents by "foreign attachment." All such statutes provide for service by publication and some, in addition, provide for an effort to give personal notice, either by mail or service outside of the state. When there is a sufficient statute, courts have jurisdiction to determine a personal obligation and enforce the adjudication to the extent of property previously seized and service by publication only is enough to afford due process.

Central Loan & Trust Company vs. Campbell Commission Company, 173 U. S. 84 (1898), Opinion by Mr. Justice White.

The Trust Company, a Texas corporation, sued the Commission Company, a Missouri corporation, in an Oklahoma territorial court upon promissory notes not then due. Attachment issued, property was seized and notice was published as authorized by territorial statute. It was held:

(Syl.) "4. That the court acquired jurisdiction of the defendant corporation by constructive service, by foreign attachment, without its consent;"

and that the statute afforded due process. It is said in the opinion, page 97:

"II. It is insisted that 'under the organic act of the Territory, the court could not acquire jurisdiction of the person of the defendant by constructive service by foreign attachment without its consent.'

The section of the organic act referred to requires that all civil actions shall be brought in the county where a defendant resides or can be found. In a proceeding by attachment of property, which is in the nature of an action *in rem, it is elementary that the defendant is found, to the extent of the property levied upon, where the property is attached.* It would be an extremely strained construction of the language of the act to hold that Congress intended to prohibit a remedy universally pursued, that of proceeding against the property of non-residents in the place in the territory where the property of such non-resident is found."

Security Savings Bank v. California, 263 U. S. 282 (1923).

In the opinion of the court by Mr. Justice Brandeis, page 287, it is said:

"But whether the proceeding should be described as being *in rem* or as being *quasi in rem* is not of legal significance in this connection. In either case the essentials of jurisdiction over the deposits are that there be seizure of the *res* at the commencement of the suit; and reasonable notice and opportunity to be heard."

Missouri v. North, 271 U. S. 40 (1926).

In the opinion by Mr. Justice Stone, page 42, it is said:

"The due process clause does not guarantee to a citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it."

Many other cases might be cited which recognize that under such proceedings determination of a personal obligation is valid to the extent of subject matter within the control of the court. Among them are:

Bischoff v. Wethered, 9 Wall. 812 (1869);
Cooper v. Reynolds, 10 Wall. 308 (1870);
Harkness v. Hyde, 98 U. S. 476 (1878);
Pennoyer vs. Neff, 95 U. S. 714 (1877);
Arndt v. Griggs, 134 U. S. 316 (1890);
Hamilton v. Brown, 161 U. S. 256 (1895);
Roller v. Holly, 176 U. S. 398 (1899);
Leigh v. Green, 193 U. S. 79 (1903);
Ballard v. Hunter, 204 U. S. 241 (1906);
Blinn v. Nelson, 222 U. S. 1 (1911);
Jacob v. Roberts, 223 U. S. 261 (1911);
Miedreich v. Lauenstein, 232 U. S. 236 (1914);
Grannis v. Ordean, 234 U. S. 385 (1913).

V. SERVICE OF THE "ORDER TO SHOW CAUSE" IS SUFFICIENT NOTICE OF THE OFFENCE TO AFFORD DUE PROCESS. (ANSWERING APPELLANT'S POINT C.)

The appellant's point C is (B. 34)—

> "The Act does not require actual or any other notice to defendant of the offense or of the government's claim against his property, and hence violates due process * * *."

The appellant has separate procedural points, H-b and H-c, to the effect that even if the Act does require sufficient notice to satisfy due process, that he did not get such notice in these cases. We will deal here only with the attack upon the Walsh Act.

The argument of the appellant is that the Act only requires service by publication, or personally, of an order to

show cause, which may not recite the facts surrounding the offense. (B. 34, RB. 32.)

The Act provides (Sec. 4) that, if the witness fails to appear, the court shall, upon proper showing, "issue an *order* directing the witness to appear before the court at a time in such order designated *to show cause why he should not be adjudged guilty of contempt* and be punished accordingly." Sec. 5. "Upon issuing such order the court may * * * direct *as a part of such order* that the property of the recusing witness * * * shall be levied upon and seized * * * to be held to satisfy any judgment that may be rendered against such witness in the proceeding so instituted." Sec. 6. "The marshal * * * shall * * * forward to the consul * * * a copy of the order to show cause * * * with the request that said consul make service of the same personally upon the recusing witness, and shall cause to be published such order to show cause and for the sequestration of the property of such witness * * *." Sec. 3 makes it the "*duty*" of the consul to try to make such service upon such "request."

Therefore, the order to show cause which will be published and, if reasonably possible, served personally upon the witness will notify him of:

(1) the court where he will have a hearing;

(2) the time of such hearing;

(3) the object of the hearing;

(4) the seizure of property; and

(5) the object of the seizure.

Such notice fulfills all the essentials of due process as defined by the Supreme Court in the foregoing cases in contempt and *quasi in rem*.

The appellant argues that the Act instead of simply requiring notice of the object of the hearing, to-wit: that it

is for the purpose of giving the defaulting witness an opportunity to show cause why he should not be adjudged in contempt of court, should lay down in detail the contents of an order to show cause, including specification of the facts ordinarily embodied in the motion, petition or affidavit of information leading up to the order to show cause, or that it should require a copy of such motion, petition or affidavit of information to be served along with the order to show cause.

The appellant calls attention to that part of the Clayton Act in U. S. C. A., Tit. 28, Sec. 387, which requires that in proceedings under that Act, a copy of the affidavit of information shall accompany the order to show cause. The mere fact that such procedure is required in one statute is no reason that it must be required in all statutes. On the contrary, the fact that it has been expressly required in proceedings under the Clayton Act leads to the inference that it is not necessary, apart from statutory requirement, that such details accompany the order to show cause.

The case of *In re Rosser*, 101 Fed. 562 (C. C. A. 8th Cir., 1900), cited by the appellant (B. 34) concerned a section of the bankruptcy act which provided in general terms for an order to appear for examination concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration. The language of the Act is just as general as it is in the Act of July 3, 1926 with respect to the contents of the order to show cause. Nevertheless, the court did not hold the Act unconstitutional as not requiring particularity as to the subject matter to be investigated. The court merely held that the order which was issued was in fact and law insufficient. In other words, the order did not comply with the implied requirements of the Act. This is appellant's point H-c, and as stated aforesaid will be considered hereinafter.

The case of *Coe vs. Armour Fert. Wks.*, 237 U. S. 413, (1915) cited by the appellant (B. 35) concerned a Florida statute which permitted judgment against a stockholder of a corporation upon an unsatisfied judgment against the corporation to the extent of the stockholder's unpaid stock subscription without providing for any statement of claim, notice thereof or hearing thereon. Obviously such a statute does not afford the stockholder due process. The Act of July 3, 1926 does provide for a hearing after notice of the charge before judgment. The appellant in quoting from the opinion in the *Coe* case (in his brief in the Court of Appeals) carefully omitted the paragraph which shows the inapplicability of the decision in that case to the cases at bar. It is said in the opinion, at page 425:

> "The writ of execution cannot of itself be treated as equivalent to a writ of attachment, establishing a lien upon the stockholder's property, but going no further until he has had an opportunity to show cause why that property should not be applied to the payment of the corporation's debt. Not only is such a purpose wholly unexpressed in the writ, but such is not its normal function or effect, no 'day in court' is named, and there is no provision for notice or monition by service, publication, mailing, or otherwise. *Windsor v. McVeigh*, 93 U. S. 274, 279, *et seq.*, *Grannis v. Ordean*, 234 U. S. 385, 393."

In other words, if the Florida statute had provided for a hearing after notice of the claim at which the stockholder could show cause why judgment should not be rendered against him, the statute would not have been open to the objection that was sustained. Consequently, since the Act of July 3, 1926 does make such provision it is not open to objection.

When an Act of Congress specifies that a particular thing shall be done, such as an order to show cause why a defaulting witness shall not be adjudged in contempt, the

Congress need not specify the details of the order. It is entitled to assume that the order will contain all the particulars essential to comply with the Constitution and other laws not inconsistent with the statute.

> "It is elementary that what is implied in a statute is as much a part of it as what is expressed. * * * It is also elementary that, when a power is conferred by statute, everything necessary to carry out the power and make it effectual and complete will be implied." (*Dooley v. Pennsylvania Rd.*, 250 F. 142, 143, 1918.)

> "A statute will not be held unconstitutional or void because of mere omission of details necessary to accomplish its evident purpose, for such details can be supplied by reasonable implication." (*State v. Kansas City*, 310 Mo. 542; 276 S. W. 389, 397.)

We also cite:

Durousseau v. United States, 6 Cranch 307, 314, (1810);

County of Wilson v. National Bank, 103 U. S. 770, 778 (1880);

The Paquette Habana, 175 U. S. 677 (1900);

People ex rel. v. Eddy, 57 Barb. 593, 598, (1870).

In view of the foregoing principles of law, it would seem unnecessary to note the specific grounds upon which the appellant asserts the order to show cause, required by the Act, will be indefinite. Therefore, we will only very briefly touch upon them.

One contention is that the Act does not require either the subpoenas or the orders to show cause to include notice that they are served under the authority of the Walsh Act, (B. 35, RB. 32), "in the absence of which he is entitled to assume that it is a general subpoena issued under general law, and because served 'beyond the jurisdiction of the United States,' is void." (RB. 32.)

In the court below the appellant relied upon the Canadian case of *Darling, In re,* 39 Upper Canada, Q. B. Rep., 339 (1876). The statutes of Canada, involved in that case, require that the subpoena bear notice of the Act under which issued. There is nothing in the Walsh Act that requires such a note on the subpoena or on the order to show cause and no reason under our Constitution or any other statute for including such notice. Even an indictment need not have a note on it of the statute under which it is brought. *Leonard v. United States,* 18 F. 2d, 208, 212, (6th C. C. A. 1927).

A citizen is constructively charged with notice and knowledge of the statutes and laws of the land, so that contrary to the assertions of the appellant, quoted above, we submit that a citizen subpoenaed from abroad by personal service of an ordinary subpoena, is bound by the subpoena, if there were any law authorizing such procedure, and that he is not entitled to assume that it was an invalid subpoena merely because without a proper statute it would be invalid.

The next ground of attack is that the order to show cause may not identify which of several contempts is referred to.

If the accused complies with the order to show cause, there can be no doubt that before trial he will know, in all necessary detail, which of his many contempts is referred to. As the contempt cases we have cited say—all that is necessary to due process is that in ample time to prepare a defense, the accused be advised in some form of the charges against him. If the order to show cause leaves him in doubt, he may apply for a bill of particulars. (*Bowles v. United States,* 50 F. 2d, 848, 852, (4th C. C. A. 1931) quoted *infra,* pp. 162-163).

In *Durland v. United States*, 161 U. S. 306 (1896), it is said in the opinion of this Court, page 315:

> "If defendant had desired further specification and identification, he could have secured it by demanding a bill of particulars. *Rosen v. United States*, 161 U. S. 29."

We also cite:

Lewis v. United States, 295 F. 441, 443 (1924), (certiorari denied, 265 U. S. 594);

Leverkuhn v. United States, 297 F. 590, 593, (5th C. C. A., 1924);

Case v. United States, 6 F. 2d, 530, 9th C. C. A., 1925); and

Wilson v. United States, 275 F. 307, 310, 311 (1921), (certiorari denied 42 S. Ct. 57) in which many decisions of this Court are collected.

The same principles that we have outlined above, dispose of the appellant's contention, (B. 34; RB. 32, 33), that the Act does not require the order to show cause to specify the claim against the property that is seized, or to identify the property that has been seized. On this contention, in addition to what has already been said, we call attention to the principle of law that the owners of property seized by the processes of court, are presumed to be found with the property. (*Central Loan & Trust Company v. Campbell Commission Company*, 173 U. S. 84, (*supra*, page 120). The court need not concern itself with such an unusual property owner as will not know what property has been seized, or why it has been seized, within a very short time after the seizure. Perhaps the appellant is so rich that he can lose $100,000 of property without missing it, but the Act does not and need not contemplate such indifference.

Contrary to the assertions of the appellant, (B. 34, 35) that special counsel for the government in these cases, by the form and conditions of the orders to show cause involved in the cases at bar, interpreted the Act as not requiring notice to the defendant of his alleged offense or of the alleged claim against the property, we assert that the only proper inference from the form and conditions of the orders to show cause involved herein, is that special counsel for the government construed them as giving the appellant all necessary notice. Whether the orders to show cause did in fact give all necessary notice, or whether the appellant obtained all necessary notice in any other way, will be discussed in answer to appellant's points H-b and H-c, as aforesaid. Suffice it to say that we are in hearty accord with the appellant's argument that he was entitled to notice of the charges and so there is no need to consider the authorities he cites to sustain that proposition. We respectfully submit that the Act requires and accords all notice necessary to satisfy due process.

VI. NO UNREASONABLE SEARCH AND SEIZURE, IN VIOLATION OF THE FOURTH AMENDMENT, IS AUTHORIZED BY THE ACT. (ANSWERING APPELLANT'S POINT D)

It is significant that the appellant has no point that there was any search whatever for the property seized in the cases at bar, to say nothing of there having been any unreasonable search and seizure. His only point is that Congress intended in the Walsh Act that there would be an unreasonable search and seizure and that therefore the Act is unconstitutional. Merely to state the contention is to show its error.

As early as 1781 this Court said all that is necessary to dispose of this point. In *The Resolution,* 2 Dallas, 1, the court was considering an Act of Congress relative to

vessels captured as prizes, and said in the opinion, pages *3 and *4:

> "But it is alleged, that 'the late ordinance of congress is express and decided, that after a capture and occupation for twenty-four hours, the property captured shall be prize'. The ordinance of congress certainly speaks of a legal capture; to admit a different construction would be a violence both to the terms and spirit or intention of it. Prize is generally used as a technical term, to express a legal capture; and congress having adopted it, in framing of the ordinance, the general sense or acceptance of it must determine its import and signification."

The appellant argues that the amount of property to be seized is in the uncontrolled discretion of the court and that there is no way for the marshal to find the property except to search for it and there is no limitation upon the place of search. (B. 36.) It is well settled that a statute is not to be declared unconstitutional because of anticipated improper or invalid actions or abuse of discretion in the administration of the statute.

Smith v. Cahoon, 283 U. S. 553, 562, (1931 preliminary print), 51 S. Ct. 582, 585;
Gundling v. Chicago, 177 U. S. 183, 186, (1900);
Lehon v. Atlanta, 242 U. S. 53, 55, 56, (1916);
Hall v. Geiger-Jones, 242 U. S. 539, 553 (1917).

This Court said in *Go-Bart Importing Company v. United States*, 282 U. S. 344, (1931) at page 357 of the opinion:

> "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."

Since the appellant does not claim that the search and seizure in the cases at bar was unreasonable, we believe this Court need not anticipate improper administration or exer-

cise of discretion under the Walsh Act but may wait until a case is presented in which there is a claim of unreasonable search and seizure and decide it "upon its own facts and circumstances."

That construction of a statute will be given, if possible, that will sustain the constitutionality of the enactment. It will be presumed that the procedure generally prescribed will be administered in conformity with constitutional law so that if the marshal has any doubt as to where to go for the amount of property ordered seized, he may require such affidavits and directions as are customary in attachment cases and in levies and sales upon execution.

We are again met by the assertion that these contempt proceedings are criminal actions; that "non-offending" property is seized while the presumption of innocence obtains, without any prior notice or hearing and in the absence of personal jurisdiction over the accused. We have already shown the error in most of these assertions. In so far as the argument is that property may not be seized while the presumption of innocence obtains and in advance of hearing, we refer to the familiar procedure in foreign attachment cases.

The Fourth Amendment must be interpreted in conjunction with the clause in the Fifth Amendment that no person shall be compelled in any criminal case to be a witness against himself. Before there can be an unreasonable search and seizure, it must appear that the ultimate object is the procurement of incriminating evidence—

Boyd v. United States, 116 U. S. 616, 622, 624, 626, 630, 633, 634, (1885);

Weeks v. United States, 232 U. S. 383, (1913);

Gouled v. United States, 255 U. S. 298, (1921);

and we do not believe that *Go-Bart Importing Company v. United States, supra,* holds to the contrary for it involved

what was held to be an unreasonable search and seizure for incriminating papers kept in a safe belonging to the accused.

It will be remembered that in the case of *Bartue and Duchess of Suffolk*, and in the case of *Knowles v. Luce*, *supra*, page 43, it is held that at common law the sovereign has the right to forfeit all the property of a subject or citizen who is abroad and refuses to return pursuant to request of the sovereign. So the Walsh Act, in authorizing the court to direct seizure of property belonging to a recusant citizen of the United States, and to fix the amount that shall be seized, is not reasonable.

VII. HOLDING THE HEARING AND PRONOUNCING JUDGMENT IN THE ABSENCE OF APPELLANT DID NOT VIOLATE DUE PROCESS. (ANSWERING APPELLANT'S POINT E)

The Walsh Act gives the recusant witness an opportunity to be personally present at his hearing and at the time judgment is announced. It does not require his presence.

The entire argument of the appellant upon this point is predicated upon what has hereinbefore been shown to be erroneous premises—first, that "criminal" contempt is a crime, a misdemeanor or a felony, and, second, that *quasi in rem* procedure can not be used in contempt cases. There is no need to repeat our argument upon those propositions. For that reason we need not comment upon the misdemeanor cases cited by the appellant; (*United States v. Mayo*, Federal Case No. 15754, 26 F. C. 1230 (1853); *United States v. Shelton*, 6 F. 2d, 897 (1925), and *Lewis v. United States*, 146 U. S. 370 (1892)). (B. 38; RB. 39, 40.)

Of course, in the cases at bar, in view of the personal service had upon the appellant he is not entitled to raise the question of the validity of proceeding upon attachment

and service by publication only. But we submit that even such proceedings, when duly authorized by statute, are within the jurisdiction of the court and do not violate due process.

We interpret *Terry, Ex Parte,* 128 U. S. 289, (1888), cited by the appellant, (B. 37; RB. 40) as holding exactly the contrary to his position. In that case this Court held that one who commits a direct contempt in the face of the court, but who leaves the courtroom before punishment therefor, may, in his absence, be sentenced for the contempt. If contempt were a crime that could not be done. The only difference between such form of contempt and the form involved in the cases at bar, is that in this type of contempt the accused must have notice of the charges and "an opportunity, before sending him to jail, to answer the charge of having committed a contempt." (*Terry* case, page 311.)

The appellant emphasizes the language of the opinion in that case, pages 311-312:

> "Jurisdiction to inflict such punishment having attached while he was in the presence of the court, it would not have been defeated or lost by his flight and voluntary absence."

We believe, in view of the issues of that case and the context, that the statement refers to the necessity of notice prior to trial in order to constitute jurisdiction from the standpoint of due process. There is no need to repeat here that in these cases the appellant had such notice, both personally and by seizure of his property and by publication.

In *Merchants Stock & Grain Company v. Board of Trade,* 201 F. 20 (8th C. C. A. 1912), the court considered criminal contempt charges, the contempt not having been

in the presence of the court; and said at page 27 of the opinion:

> "*Fifth.* For a criminal actual contempt the defendant may without a waiver and without his consent be sentenced in his absence. *Ex parte Terry,* 128 U. S., 289 *-* *; *Middlebrook v. State,* 43 Conn., 257, * * *."

Mr. Justice Van Orsdel quoted the above language with approval in his opinion for this Court in *Re Gompers,* 40 App. D. C., 293 (1913), and also says, (page 328):

> "*Error is urged in the appointment of a United States Commissioner for the purpose of taking testimony in this cause. The custom of taking testimony by deposition, affidavit, or interrogatories in contempt cases is ancient.* 1 *Newland's Ch. Pr.* 392. *The practice has prevailed generally in this country. Rapalje, Contempt,* 124; *Fletcher, Eq. Pl. & Pr.* sec. 553; *Una v. Dodd,* 38 N. J. Eq. 460. It was the method adopted by the Supreme Court in the recent case of *United States v. Shipp,* 203 U. S. 563, 51 L. ed. 319, 27 Sup. Ct. Rep. 165, 8 Ann. Cas. 265, 214 U. S. 386, 53 L. ed. 1041, 29 Sup. Ct. Rep. 637. See also *Re Savin,* 131 U. S. 267, 278, 33 L. ed. 150, 153, 9 Sup. Ct. Rep. 699; *Re Chiles* (*Texas v. White*), 22 Wall. 157, 22 L. ed. 819. *The question, however, does not arise in this case, since all testimony was taken in open court.*"

While some of the safeguards thrown about punishment for a crime, have, by analogy, been held elements of due process in criminal contempt cases, there are many more respects in which the contempt proceedings may differ from criminal prosecutions—first, criminal contempts are tried summarily; second, no formal indictment is necessary; third, testimony may be taken in the absence of the accused by deposition, affidavit or interrogatories; fourth, courts having no criminal jurisdiction, (courts of chancery and other courts) can punish for so-called criminal contempt; fifth, there is no right of trial by jury; sixth, no

change of venue can be allowed—contempt must be tried by the court offended; seventh, even if the contemptuous act were also a crime, punishment for the contempt will not bar punishment for the crime—the principles of double jeopardy are not applicable; and eighth, as aforesaid, the accused may, without a waiver and without his consent, be tried and sentenced in his absence, provided in cases of contempts not committed in the presence of the court, he should have notice of the charges and an opportunity to present his defense.

These propositions are established by the authorities we have cited immediately above, and also at pages 100 to 117 of this brief.

It does not seem to us that this Court would have used the expression in *Cooke v. United States, supra,* page 114,

> "* * * the accused (in a prosecution for contempt not committed in open court) should be advised of the charges and have a reasonable *opportunity* to meet them by way of defense or explanation"

if it were necessary that the accused be brought and held at the bar of the court. Instead of saying that the accused should have reasonable "*opportunity*" to meet the charges, the court would have said that he have such opportunity and be brought and held in custody as a criminal. Punishment for contempt, not being a crime "within the Sixth Amendment or common understanding" is subject to regulation by the Congress as in the Walsh Act as to whether the accused may be tried and sentenced in his absence.

VIII. THE ACT DOES NOT VIOLATE THE RIGHT OF AN ACCUSED TO COMPULSORY PROCESS FOR OBTAINING WITNESSES GUARANTEED BY THE SIXTH AMENDMENT. (ANSWERING APPELLANT'S POINT F)

A. THE APPELLANT IS NOT ENTITLED TO RAISE THE POINT.

The Sixth Amendment to the Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor, * * *."

To make the appellant's argument concrete, instead of an abstract attack upon the Walsh Act, it is that Sinclair and Fall in the criminal conspiracy case for which appellant was subpoenaed, could not have subpoenaed the appellant or any other witness from abroad; that therefore the Act is contrary to the foregoing provision of the Sixth Amendment and that the appellant thus owed no duty to respond to the subpoenas, and can be guilty of no contempt in not obeying them.

In connection with the argument of the appellant in the trial court in support of his motion to vacate the proceedings, he expressly disclaimed any contention that he himself in the hearing on the contempt charges, does not have all constitutional rights for obtaining witnesses in his favor. (Supreme Court of the District of Columbia, *United States v. Blackmer,* Contempt No. 16—"Reply Brief for Respondent in Support of Motion to Vacate Proceedings," page 2). In other words—

> "The only question in this regard is whether the defendants in the case of *United States v. Sinclair and Fall* have that constitutional right; * * *" (same brief of appellant, page 2).

It is therefore clear the appellant seeks to avoid the consequences of his recusancy because he asserts a constitutional right of third parties is violated. The argument is upon the assumption that if the Act gave or gives the accused, in the case for which the witness is subpoenaed, the same and equal right with the government, then the appellant would be guilty, but otherwise not.

Jeffrey Manufacturing Company v. Blagg, 235 U. S. 571, (1915).

In this case, the constitutionality of the Workmen's Compensation Law of Ohio was challenged as to the single feature taking away the defense of contributory negligence from establishments employing five or more and permitting such defense to those concerns which employ less than five. The argument was based upon supposed wrongs to the employee, but no employee was complaining in the action of such injustice so it was said in the opinion of the Court, page 576:

> "The argument based upon such discrimination, so far as it affects employes by themselves considered, cannot be decisive; for it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality *in the feature complained of. Southern Railway v. King,* 217 U. S. 524, 534; *Engel v. O'Malley,* 219 U. S. 128, 135; *Standard Stock Food Co. v. Wright,* 225 U. S. 540, 550; *Yazoo & Mississippi Valley R. R. v. Jackson Vinegar Co.,* 226 U. S. 217, 219; *Rosenthal v. New York,* 226 U. S. 260, 271; *Darnell v. Indiana,* 226 U. S. 390, 398; *Plymouth Coal Co. v. Pennsylvania,* 232 U. S. 531, 544; *Missouri, Kansas & Texas Ry. v. Cade,* 233 U. S. 642, 648."

The same principle is applied in *Roberts & Schaefer Company v. Emmerson,* 271 U. S. 50 (1926), opinion by Mr. Justice Stone, pages 54, 55; *Gorieb v. Fox,* 274 U. S.

603 (1927); opinion by Mr. Justice Sutherland, page 606; *Aetna Insurance Company v. Hyde*, 275 U. S. 440 (1928), opinion by Mr. Justice Butler, pages 446, 447.

Blair vs. United States, 250 U. S. 273 (1919).

Plaintiffs in error were adjudged guilty of contempt of court because of their refusal to obey a court order directing them to answer certain questions asked of them before a federal grand jury and committing them to the custody of the marshal until they should so comply. Upon their refusal to answer the questions propounded, the grand jury made a written presentment of such facts to the District Court with a prayer that they might be dealt with as contumacious witnesses. In opposition to the petition of the grand jury, counsel for the witnesses contended that the Corrupt Practices Act of June 25, 1910 (36 Stat. 822), was unconstitutional and void and hence the grand jury lacked authority to investigate supposed violations of that Act. At the conclusion of the hearing the court directed the witnesses to answer the question propounded; and upon their refusal so to do, they were subsequently adjudged guilty of contempt. In affirming the judgment, Mr. Justice Pitney of the Supreme Court stated (pp. 281-283):

> "But, aside from exceptions and qualifications—and none such is asserted in the present case—the witness is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry."
>
> "*He is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his. Nelson v. United States*, 201 U. S. 92, 115."
>
> "On familiar principles, he is not entitled to challenge the authority of the court or of the grand jury, provided they have a *de facto* existence and organization. * * *"

"And, for the same reasons, witnesses are not entitled to take exception to the jurisdiction of the grand jury or the court over the particular subject matter that is under investigation. In truth it is in the ordinary case no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not. At least, the court and grand jury have authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction."

"The present cases are not exceptional, and for the reasons that have been outlined we are of opinion that appellants were not entitled to raise any question about the constitutionality of the statutes under which the grand jury's investigation was conducted."

To like effect is the recent case of:

United States vs. Watson, 266 Fed. 736 (D. C. Fla., 1920), where a witness before a grand jury was not permitted to question the constitutionality of the Lever Act authorizing the investigation or the authority of the grand jury to call before it a witness to ascertain any infraction of that Act.

The appellant seeks to distingush the *Blair* and *Watson* cases, *supra,* by pointing out, (B. 40) that he does not attack the constitutionality of the statutes under which Sinclair and Fall were prosecuted, nor the resolutions permitting the prosecutions, nor the grand jury investigations preceding them. The distinction ignores the reasoning of the cases, which is that a witness is not to concern himself with the rights of the parties to the case in which subpoenaed. We do not deny the appellant's right to challenge the constitutionality of those features of the Walsh Act as have directly affected him, but we contend he has no right to question such features as only could affect Sinclair and Fall or that did not operate to appellant's prejudice. Just as in the *Blair* and *Watson* cases, the ap-

pellant lacks the capacity to raise this point because he is attempting to assert an alleged defect that only concerned, as a primary right, the defendants in the criminal trial. The appellant's position is exactly parallel with the situation in the *Jeffrey Manufacturing Company v. Blagg* case, *supra.*

B. THE SIXTH AMENDMENT DOES NOT REQUIRE THAT THE ACCUSED IN THE CRIMINAL PROSECUTION HAVE EQUAL COMPULSORY PROCESS WITH THE PROCESS AVAILABLE TO THE GOVERNMENT.

It is apparent that the Sixth Amendment does not guarantee to those being tried for a crime that they shall have compulsory process for obtaining witnesses *equal* to the process available to the prosecution. It merely guarantees compulsory process, not *equal* compulsory process. Appellant relies upon the case of *In re Dillon,* 7 Fed. Cases No. 3914, p. 710 (7 Sawyer 561) (1854). This was a case in which one Del Valle was on trial for a criminal offense. He had obtained a subpoena *duces tecum* directed to Dillon, a consul of France in California. Dillon failed to respond and the issue was as to whether he could and should be compelled to respond. He relied upon a treaty between the United States and France, exempting consuls from the obligation to appear in court as witnesses. The district judge in deciding the question ruled that the compulsory process guaranteed to the accused did not include the right to process against witnesses constructively beyond the jurisdiction of the court or otherwise exempted from obedience to subpoena. As an *obiter dictum* the district judge said that the Sixth Amendment gives those on trial for crime "rights in all respects similar and equal to those possessed by the Government for establishing his guilt." (p. 712.) This *dictum* does not follow

from the reasoning of the district judge leading up to the statement. That reasoning is (p. 712):

> "It is now in England by statutes comparatively recent, provided that the accused shall in all cases have the right of having witnesses sworn for him as well as against him. I am not aware that he even yet, in that country, possesses the right to compulsory process to obtain their attendance * * *. *Such was the state of the common law when the provisions giving the accused the right to compulsory process to secure the attendances of his witnesses and the right to have the assistance of counsel, were incorporated into the Constitution.*"

Accepting that statement as to the status of the common law at the time the Constitution was adopted, then upon familiar principles of constitutional law the provision should be interpreted to afford the defendant in a criminal case compulsory process to obtain the witnesses within the common law reach of such process.

The background of the Sixth Amendment is given in *United States v. Reid*, 12 How. 361 (1851), at page 364 of the opinion as follows:

> "But as the law formerly stood, the value of this right was much impaired by the mode of proceeding in criminal cases. For when a person was accused of a capital crime, and his life depended upon the issue of the trial, he was denied compulsory process for his witnesses; and when they voluntarily appeared in his behalf, he was not permitted to examine them on oath, nor to have the aid of counsel in his defense, except only as regarded the questions of law.
>
> "It is true that Lord Coke, in his 3 Inst. part 3, 79, declares in strong terms that the rule which prohibited the witnesses for the accused from being examined on oath, was not founded in law. Yet the rule, at the period we speak of, was daily sanctioned and acted on in the English courts. 2 Hale, P. of the Crown, 283,

4 Bl. Com. 355, 358, 359, and was in full force when the English colonies were planted in this country.

"This oppressive mode of proceeding had been abolished in England and the colonies also by different statutes before the declaration of independence. But the memory of the abuses which had been practised under it had not passed away. And the thirteen colonies who united in the declaration of independence, as soon as they became States, placed in their respective constitutions or fundamental laws, safeguards against the restoration of proceedings which were so oppressive and odious while they remained in force. It was the people of these thirteen States which formed the Constitution of the United States, and ingrafted on it the provision which secures the trial by jury, and abolishes the old common-law proceeding which had so often been used for the purposes of oppression. And the provisions in the Constitution of the United States in this respect are substantially the same with those which had been previously adopted in the several States. They were overlooked in the Constitution of the United States as originally framed. But as soon as the public attention was called to the fact, that the securities for a fair and impartial trial by jury in criminal cases had not been inserted among the cardinal principles of the new government, they hastened to amend it, and to secure to a party accused of an offence against the United States, the same mode of trial, and the same mode of proceeding, *that had been previously established and practised in the courts of the several States.*"

Section 29 of the First Crimes Act of April 30, 1790 (1 Stat. 118) (R. S. Sec. 1034; U. S. C. A., tit. 18, Sec. 563) (referred to in *Re Dillon, supra*) is significant in that it provides that any person indicted for treason or for a capital offense

"shall have the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial, as is *usually* granted

to compel witnesses to appear on the prosecution against them."

Thus, the Congress composed of men lately familiar with the formation of the Constitution only provided for equal process for those accused of treason and capital offenses. Impliedly, they did not consider equal process necessary under the Constitution and were making this provision for equal process in limited classes of cases. Such declaration is significant and persuasive that equal process is not guaranteed by the Sixth Amendment.

There are a number of respects in which a person accused of crime has a lesser right to compulsory process than is accorded to the government:

1. When an indigent criminal defendant is upon trial he is given a limited right to compulsory process for his witnesses at the government's expense. This is provided by U. S. C. A., tit. 28, section 656 (R. S. §878; 9 Stat. 74) as follows:

> "Whenever any person indicted in a court of the United States makes affidavit, setting forth that there are witnesses whose evidence is material to his defense; that he cannot safely go to trial without them; what he expects to prove by each of them; that they are within the district in which the court is held, or within one hundred miles of the place of trial; and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses that the court in term, or any judge thereof in vacation, may order such witnesses be subpoenaed if found within the limits aforesaid. In such case the costs incurred by the process and the fees of the witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpoenaed in behalf of the United States."

Thus the right to compulsory process on behalf of an indigent defendant is left wholly in the discretion of the trial

court and this discretion has been held not subject to review. *Goldsby v. United States*, 160 U. S. 70 (1895); *Crumpton v. United States*, 138 U. S. 361 (1891); *Dupuis v. United States*, 5 F. 2d 231 (1925).

While on the other hand the right of the District Attorney to compulsory process for securing the attendance of witnesses on behalf of the United States, at the expense of the government, is unlimited. See *United States v. Barefield*, 23 F. 136 (D. C. Tex., 1885) at 137, where the court said:

> "* * * The process of subpoena is always at the command of the United States district attorney, without the authorization of this court, and witnesses, when subpoenaed under his order and discharged by him, are allowed by the court their *per diem* and mileage."

2. Likewise the rights of the government and the defendant are far from being equal when the issuance of a recognizance is involved to insure the attendance of a witness at a trial. See U. S. C. A., Tit. 28, Section 657. (R. S. Section 879; 9 Stat. 73.)

> "Any judge or other officer who may be authorized to arrest and imprison or bail persons charged with any crime or offense against the United States, may, at the hearing of any such charge, require of any witness produced against the prisoner, on pain of imprisonment, a recognizance, with or without sureties, in his discretion, for his appearance to testify in the case. And, where the crime or offense is charged to have been committed on the high seas, or elsewhere within the admiralty and maritime jurisdiction of the United States, he may, in his discretion, require a like recognizance, with such sureties as he may deem necessary, of any witness produced in behalf of the accused, whose testimony in his opinion is important, and is in danger of being otherwise lost."

Also see U. S. C. A., Tit. 28, 659 (9 Stat. 73) (R. S. Section 881), which provides that any federal judge, on appli-

cation of the District Attorney; and being satisfied by proof that any person is a competent witness in a criminal proceeding in which the United States is a party or interested, may have such person brought before him by a warrant of arrest to give recognizance, and that such person may be confined until removed for the purpose of giving fair testimony or until he gives the recognizance required by said judge. The attorney for a criminal defendant has no such means of insuring the attendance of his witnesses, yet the Supreme Court said in *Barry, Sergeant at Arms, et al. vs. United States ex rel. Cunningham*, 279 U. S. 597 (1929), at 617:

> "The constitutionality of this statute apparently has never been doubted. Similar statutes exist in many of the states and have been enforced without question."

and at page 618:

> "The validity of acts of Congress authorizing courts to exercise the power in question thus seems to be established."

3. "The constitution provides that the defendant shall have compulsory process to obtain the testimony of his own witnesses, but does not guarantee more than ordinary diligence on the part of the officers, or that they shall serve a witness who conceals himself." (*Smith v. State*, 118 Ga. 61; 44 S. E. 817 (1903).)

See also 40 *Cyc.* 2157; *State v. Huff*, 161 Mo. 459, 61 S. W. 900 (1901); *State v. Capola*, 102 Southern 82 (La. 1924). The officers might exercise more than "ordinary diligence" on behalf of government but the fact that they are only required to exercise ordinary diligence in behalf of the accused is not a denial of "compulsory process" and hence *equal* process is not required.

4. The granting of a continuance predicated on the absence of witnesses desired by the accused rests in the

sound discretion of the court not subject to review in the absence of abuse. It is possible that the court would be more liberal in its discretion in behalf of the government. The point is that mathematical equality is not required. 40 *Cyc.* 2157; *State v. Pope,* 78 S. C. 264, 58 S. E. 815 (1906); *Moore v. State,* 59 Fla. 23, 52 So. 971 (1910); *Pittman v. State,* 51 Fla. 94, 41 So. 385 (1906).

5. It is within the discretion of the court whether it will grant a request of an accused for the appearance as a witness of a person confined in jail or state prison. 40 *Cyc.* 2160; *State v. Kennedy,* 20 Ia. 372 (1866); *Ex Parte Marmaduke,* 91 Mo. 228; 4 S. W. 91 (1886). An order for the taking of the depositions of desired witnesses who are in prison sufficiently protects the right of the accused. *People v. Putnam,* 129 Calif. 258; 61 Pac. 961 (1900).

6. The issuance of a subpoena *duces tecum* is in the discretion of the Court. 40 *Cyc.* 2169, paragraph g.

It is said in 40 *Cyc.* at page 2158:

> "The guarantee of compulsory process does not preclude legislative regulation in the matter of procuring the attendance of witnesses by persons accused of crime, so long as the right is not impaired or its reasonable exercise denied, especially where it is proposed to throw the burden of the cost and expense to be incurred therein upon the state or the county."

C. THE ACCUSED IN THE CRIMINAL CASE HAS SUBSTANTIALLY EQUAL PROCESS.

Under Section 1 of the Walsh Act, if a defendant has issued letters rogatory to obtain the testimony of the witness in a foreign country, and such witness does not respond thereto, the defendant may have a subpoena for the witness to appear at the trial upon like conditions and with like result to the witness as is given to the United States by Section 2 of the Act. The United States cannot have letters

rogatory in a criminal case because of the provisions of the Sixth Amendment that the accused is entitled to be confronted with the witnesses against him. That does not prevent the accused from having such letters rogatory. Federal courts have uniformly issued commissions *dedimus potestatem* to take depositions of absent witnesses in criminal cases under Section 866, Revised Statutes of the United States. Such commissions were issued in the cases of *United States v. Wilder*, 14 Fed. 393 (C. C. of Ga. 1882) and *United States v. Cameron*, 15 Fed. 794 (C. C. of Mo. 1883). They were also issued in the case of *United States v. Sinclair and Fall*, No. 43324 in the Supreme Court of the District of Columbia, to obtain the testimony of Fall after there had been an order for the separate trial of Sinclair. This was at the request of counsel for Sinclair. This is the very trial for which the appellant was subpoenaed, that is involved in Contempt No. 18 (R. ~~5139~~ 200): The trial court below stated in passing upon this point (stenographic transcript of proceedings on September 16, 1929, p. 21):

> "* * * we have frequently applications granted for testimony to be taken of witnesses on behalf of the defendant in criminal cases pending here."

Section 1 of the Act does not limit the relief to a defendant of having a subpoena issued upon default of a witness to respond to letters rogatory to civil cases. In terms it applies to such a refusal to answer to letters rogatory issued in any kind of a case. We have shown that such letters may be issued at the request of a defendant in a criminal case. Therefore, the terms of Section 1 include criminal cases.

The appellant refers to the Report of the House Committee on Judiciary, No. 1313, (Sixty-ninth Congress, 1st Session, May 26, 1926), pages 1-3 for his statement that Section 1 of the Walsh Act was intended by Congress to

apply to civil cases only, and that "the Honorable Atlee Pomerene advocated the inclusion of Section 2 of the Act because it was desired to secure testimony in criminal cases." (RB. 43.) We do not deny that government counsel requested the inclusion of Section 2 so that the government could procure such testimony in criminal cases. But it does not follow that Section 1, as the Act was finally passed, was intended to apply to civil cases only. As aforesaid, the government could only take advantage of it in civil cases, but it was available to the accused in criminal cases. Even if the interpretation of the Report by the appellant were correct, such an erroneous opinion concerning the effect of a law, expressed by a committee of Congress, does not alter the law.

Knickerbocker v. Stewart, 253 U. S. 149, (1920);
United States v. Lindsly, 7 F. 2d, 247, (D.D. La. 1925).

Then the appellant argues that letters rogatory depend upon comity; that we do not extend the right of letters rogatory except in suits for the recovery of money or property and that therefore a foreign country would not recognize our letters rogatory in criminal cases. (RB. 43-44.) The answer is obvious that the foreign country might recognize the letters, even if we would not recognize similar letters. The foreign country might waive its insistence upon reciprocity, but if it did not permit the use of letters rogatory then the spirit of Section 1 would have been satisfied so that the court could subpoena the desired witness at the instance of the accused.

The further argument of the appellant that letters rogatory are not compulsory process because the foreign country can not be compelled to execute them does not meet our answer that if the letters are recognized and executed, the accused has substantially equal process, and if they are

not so recognized, compulsory process for the witness abroad is available. The interposition of a preliminary requirement in the case of the accused, is not a final deprivation of compulsory process and is not so harsh as to make compulsory process in the case of indigent prisoners dependent upon the discretion of the court.

Since the defendant in a criminal case has the right to letters rogatory and to a subpoena for a recusing witness, he has substantially equal process to that accorded the United States. Undoubtedly had it not been for the Sixth Amendment the Act would have required default upon letters rogatory before authorizing the United States to subpoena a witness from abroad. The distinction in procedure is, therefore, a reasonable one.

The contention of the appellant under this point is analogous to a contention which has been made that a defendant in a criminal case is denied due process and the equal protection of the laws if he is not accorded equal rights of appeal to those accorded the prosecution. Nevertheless, it has been held by the Supreme Court of the United States that giving the United States the right of appeal where none is given to the defendant is not a denial of due process or equal protection of the law.

United States vs. Heinze, 218 U. S., 532 (1910).

The United States Circuit Court for the Southern District of New York sustained a demurrer to fifteen (15) counts out of sixteen (16) counts in an indictment charging Heinze with the misapplication of funds of a National Bank in violation of Section 5209, Revised Statutes. The government appealed to the Supreme Court under the act of March 2, 1907. That act conferred upon the United States alone the right to have the Supreme Court review a decision involving the construction of federal laws; and denied such right of review to defendants in every form

and at every stage of the case, except in cases involving a capital crime. It is said in the opinion of the court by Mr. Justice McKenna (pp. 545-6):

> *"It is contended by the defendant that the act of March 2, 1907, is not applicable to the case, because the right it offers is 'wholly unilateral.' 'It opens the door of this court,' it is said, 'to the United States as one party to the cause only, and denies the same privilege to the defendant.' The ultimate contention is that defendant is thereby denied the equal protection of the laws. This inequality is asserted because the United States is given an appeal to this court, and before trial, and a defendant is only given right of review in the Circuit Court of Appeals, and only at the end of the trial. The defendant is put to expense and peril, it is urged, though the indictment against him may be wholly bad, 'and is at every stage of the case forbidden the right of review upon any question in the Supreme Court, except the construction or application of the Constitution or the constitutionality of any Federal statute.' And this, it is insisted, is the denial of due process of the law as well as the denial of the equal protection of the laws. We shall not follow the somewhat roundabout argument to establish the identity of those two rights. If we should yield to the argument it would necessarily follow that if defendant has not been denied due process he has not been denied the equal protection of the law, and this court has decided that the right of appeal is not essential to due process of law. Reetz v. Michigan,* 188 U. S. 505, 508. *The provisions have definite application, and even if the explicit clause of the Fourteenth Amendment, forbidding a State to deny to any person within its jurisdiction the equal protection of its laws, can be said to apply to the United States, it can have no broader meaning when so applied than when applied to the States. Assuming, therefore, and assuming only, not deciding (see District of Columbia v. Brooke,* 214 U. S. 138, 149) *that Congress may not discriminate in its legislation, it certainly has the power of classifi-*

cation, and the act of March 2 is well within such power.''

The appellant seeks to avoid the application of the principle stated in the *Heinze* case, *supra*, with the argument that the Constitution does not guarantee an accused a compulsory right to review. However, it does guarantee the accused due process, and the distinction of the appellant would only be meritorious if the Sixth Amendment included the word ''equal'' before ''compulsory process.''

IX. THE WALSH ACT IS NOT ARBITRARY, CAPRICIOUS, OR UNREASONABLE, AND DOES NOT DENY DUE PROCESS. (ANSWERING APPELLANT'S POINT G.)

The appellant argues, (B. 40-41; RB. 44-45), that the Walsh Act is unreasonable in—

(1) making ''ownership of 'non-offending' property a condition precedent to judgment of guilt of crime''; (2), punishment will only be possible against property owners, —the rich and not the poor; (3) that property will be attached while the presumption of innocence prevails and before proof of guilt.

The first contention is so pregnant with errors that it scarcely needs notice.

First, the charge is not of a criminal offense. We will not repeat the arguments or again refer to the authorities as to that. Second, ownership of property is not a condition precedent to judgment.

We will not repeat our analysis of the Act. It is sufficient merely to call attention to the fact that if the defaulting witness returns to this country or can be personally served abroad, his guilt may be determined. What we

have already said disposes of the second contention that punishment is only possible against the rich—the property owner—and not the poor, but, in addition, it is apparent that the property owner requires the protection of the United States not only of his person abroad, which would be accorded to the poor, but also of his property in this country. It is not unreasonable to classify those who require the protection of our government for their property differently from those who have no property requiring our protection.

As to the second contention:—We are utterly unable to see any unfairness in the attachment of "non-offending" property while the presumption of innocence prevails. As well could it be argued that state statutes, providing for jurisdiction by "foreign attachment," are unreasonable in drawing a distinction between the rich and poor, property owners and non-property owners, and as involving seizure of property before adjudication of the validity of the plaintiff's claim. In such cases "non-offending" property is held while the plaintiff is under the burden of proving the obligation and duty of the defendant property owner,—one might say while the presumption of innocence prevails. (Cf., *Murray's Lessee v. Hoboken L. & I. Co.*, 18 How. 272, 277, 280, (1855)).

Even if the Act only provides punishment for the wealthy, there is no reason to allow a guilty rich man to escape just because a guilty poor man can not be punished. The rich are more likely to be able to go and stay abroad than the poor, and it is common sense, in view of human nature and the ordinary course of business and dealings, that the rich are more likely to want to place themselves in a position to avoid the necessity of testifying. The classification is not unreasonable.

It will be remembered that at common law, England could and did exercise the right of taking all the property of such an offending subject. The appellant argues that to do so savors of outlawry, and violates the rudimentary conceptions of the fundamental rights of the citizen. We deny that it is a fundamental right of a citizen to have his property and person protected by his government while he deliberately refuses to perform his obligations of allegiance to the country. Cases have very recently been before this Court in which citizenship was denied to applicants who refused to take oath to bear arms in case called upon by the government to which they sought to belong. The policy back of those decisions and the legislation upon which it is based, is as if the Congress had declared in the Walsh Act that all the property of the disobedient citizen should be confiscated by the government. The appellant deliberately put himself in a position where he forfeited some of his "fundamental rights as a citizen" (not guaranteed by the Constitution) and thereby subjected himself to the penalties of the Walsh Act just as certainly as the applicants for naturalization forfeited their right to secure such fundamental privileges of citizenship. As Mr. Justice Van Devanter said in the *Luria* case, *supra*, "membership in a political society involves its obligations as well as its rights." The appellant has been accorded all the rights guaranteed by the Constitution, and his attempt to go back of that to the "fundamental rights of the citizen" comes with poor grace from one who has flouted the government to which he owes allegiance. These remarks go to the abstract attack upon the unreasonableness of the Act, for it seeks to reach all who behave as the appellant acted.

(ANSWERING APPELLANT'S PROCEDURAL POINTS.)

Introductory Statement.

The appellant's point "H" embraces five procedural points based upon the assumed validity of the Walsh Act, but upon allegations that the procedure followed does not comply with due process under the Fifth Amendment. These points have required the appellant to admit that he went further in his statement to the trial court, quoted, *supra*, page 3, than he intended. He then stated—

> "The proceedings here in question, however, were all taken in exact pursuance of an Act of Congress, * * *.
>
> "The question thus reduces itself to a consideration of the constitutionality of this legislation."

While that statement was made with reference to Case No. 200 in this Court, the procedure in Case No. 201 was substantially the same.

If the judgments in these cases were reversed, upon appellant's procedural points "a" and "b", he would go free, and if the judgment in Case No. 201 in this Court were reversed upon the ground stated in appellant's procedural point "e", he would go free in that case. But if the judgments were reversed upon his procedural points "c" and "d", it would only lead to new proceedings. Nevertheless, we will preserve the order of discussion adopted by the appellant.

X. THE SHOWING UPON THE REQUESTS FOR SUBPOENAS WAS SUFFICIENT AND THE COURT DID NOT ABUSE ITS DISCRETION IN ISSUING THEM. (ANSWERING APPELLANT'S POINT H-a.)

The appellant argues that the subpoenas in both cases were issued without any "showing" justifying the action of the court, for the reason that the petitions for the subpoenas, signed by the two special counsel and the district attorney and verified by one of the special counsel, disclosed only a "belief" that the appellant could give the desired testimony. (B. 41, 42; RB. 45, 47.)

It is hard to understand how government counsel could ever "show" the court more than their "belief"; especially when the desired witness left the country upon the approach of clouds of danger that he might be required to testify, and had actually refused on letters rogatory issued in a previous civil case, to give more than his name. (R. 200, p. 81; R. 201, p. 74.)

We submit that the representation of government counsel of the "belief" that the appellant could give testimony as to the facts stated in the applications for the subpoenas, was a "showing" of a fact, to wit: the state of mind of government counsel, upon which the court, in its discretion, could rely or could call for a further showing. While we believe the showing made in the written petitions for the subpoenas was ample to satisfy the requirements of the statute, there is nothing in the record to indicate but that the court may have inquired further and orally of counsel concerning the foundation for their belief.

A mere statement of government counsel is sufficient for a subpoena *duces tecum*. *United States v. Terminal R. Ass'n.*, 148 F. 486, 489 (C. C. Mo., 1906). An affidavit for service by publication upon information and belief only

is sufficient. *Thompson v. Thompson*, 226 U. S. 551, 565 (1913); *Kretzschmar v. Rosasco*, 250 Mich. 9, 229 N. W. 446 (1930).

Clearly there was not such an abuse of discretion by the court in relying upon the belief of counsel for the government as would justify an appellate court in reversing the cases. In truth, the exercise of such a discretionary power by the trial court is not reviewable in the absence of clear proof of an abuse of discretion. The appellant has offered no proof whatever that the belief of government counsel was not well founded, or that he could not have testified upon the subject matters mentioned in the petitions for the subpoenas.

We have already called the attention of the Court to the law that the discretion of the trial court in determining whether and how many subpoenas to issue at the request of an indigent prisoner, is not reviewable. *Goldsby v. United States*, 160 U. S. 70 (1895), and other cases cited, *supra*, page 144. The issuance of a subpoena *duces tecum* is discretionary with the trial court, and the opposite party is not entitled to notice of the application for such a subpoena or to contest the discretion of the court in granting it. (40 *Cyc.*, p. 2169, paragraph g.) Surely, the appellant does not contend that he was entitled to notice of the application to subpoena him so that he could prepare himself to dodge service.

Finally, the appellant, or any witness so subpoenaed, should not be permitted to raise the question of the showing for the issuance of the subpoena.

One who fails to obey a subpoena, order to show cause or other order of court valid on its face and issued pursuant to jurisdiction of the court of the parties and subject matter can not question the sufficiency or regularity of the pro-

ceedings leading up thereto, or the form or sufficiency of the showing for the issuance of the subpoena or order.

Brougham v. Oceanic Co., 205 Fed. 857, (C. C. A. 2nd Cir., 1913);
People v. Sturtevant, 9 N. Y. 263, (1853);
Harris v. Clark, 10 How. Pr. (N. Y.) 415, (1854);
Day v. Bergen, 53 N. Y. 404, (1873);
Silliman v. Whitmer, 173 Pa. St. 401, (1896);
Burtch v. Zeuch, 200 Iowa 49, 202 N. W. 542, (1925);
Jenkins v. State, 59 Neb. 68, 80 N. W. 268, (1899);
State v. Nathans, 49 S. C. 199, 27 S. E. 52, (1896);
Carlson v. State, 234 U. S. 103, (1914);
Blair v. United States, 250 U. S. 273, (1919).

The appellant cites 36 *Cyc.* 434, (B. 42). Among the definitions of "show" given at that citation are the following:

> "As a verb—to exhibit or present to view; to cause to see; * * * to give the reason and explanation of; to manifest; to evince; * * *. Sometimes used as synonymous with represent."

Beyond doubt, the petitions for the subpoenas gave the reason and explanation of the applications and contained a representation by counsel for the government, sufficient to present to view and cause the court to see the reasons the appellant was wanted as a witness.

The appellant also cites *Hanford v. Duchastel*, 93 Atl. 586, (N. J., 1915).

In that case an affidavit for writ of attachment was held insufficient in that it did not set forth a cause of action. The statute required proof of a cause of action and the nature and particulars thereof, and it is said in the opinion:

> "And this, of course, means proof of facts sufficient to establish such particulars and not mere belief or conclusions of the witness."

The Walsh Act does not require government counsel to outline the testimony of the desired witness, but only to make such a showing as will, in the discretion of the court, justify a subpoena.

Apart from all questions of legal right, a witness subpoenaed, as the appellant was subpoenaed, if he believes he can give no testimony of any relevancy to the cause in which subpoenaed, or if any reason exists why he can not attend as required, should not, upon principles of fair dealing, wait until called in the trial to attack the showing for the subpoena or present his excuses. If he took the matter up immediately, no doubt the court and government counsel would be glad to consider any excuses he might have for not attending, and if it were made clear that he could give no helpful testimony, he might be released, or if it became apparent that he could give helpful testimony, the criminal case might be continued until he could more conveniently attend. To permit a witness to sit quietly back until he can no longer fulfill his duty and then attack the showing for the issuance of the subpoenas, is not only unjustifiable in law, but is contrary to good morals and fair dealing.

Dickinson v. Huntington, 185 F. 703 (C. C. A. W. Va. 1911);

Selmer v. Smith, 285 Pa. 67; 131 A. 663 (1926);

Hunter v. May, 161 Tenn. 155; 25 S. W. (2nd) 580 (1930).

XI. IT WAS NOT NECESSARY THAT THE SUBPOENAS CONTAIN NOTICE THAT THEY WERE ISSUED UNDER THE WALSH ACT. (ANSWERING APPELLANT'S POINT H-b.)

The appellant argues (B. 42-45; RB. 47-48) that the subpoenas served upon him were invalid because there was no notation on them that they were issued under the Walsh Act. This is a specific application of one of his contentions under his point "C." In answering the appellant's point "C," we have shown that neither the Walsh Act nor due process of law requires a subpoena to bear notice of the authority under which issued. We will not repeat the argument. (See *supra*, pages 126-127.)

Presumably the subpoena intended by the Walsh Act is the ordinary, customary and usual subpoena of the court. That is the form that was used in these cases.

Appellant was in a better position than the ordinary citizen who is constructively charged with notice and knowledge of the statutes and laws of the land. His attorney, Mr. Battle, advised with him in the summer of 1927, upon the question of the constitutionality of the Walsh Act, the Act of July 3, 1926. (R. ~~5131~~ 200, p. 77; R. ~~5132~~ 201, p. 70.) Appellant knew the provisions of the Act and that he might be punished under it if he failed to respond to the subpoenas. (R. ~~5131~~ 200, p. 81; R. ~~5132~~ 201, p. 75.) That was after service of the first subpoenas and before he was required to appear before the court, for the first subpoenas required him to appear on October 17, 1927. He was not only chargeable with knowledge that the subpoenas were authorized and issued under the Act, but he had actual knowledge of the fact.

XII. APPELLANT RECEIVED SUFFICIENT NOTICE OF THE OFFENSE CHARGED IN EACH CASE TO CONSTITUTE DUE PROCESS. (ANSWERING APPELLANT'S POINT H-c.)

In the appellant's brief, at page 44, it is said—

> "It should be understood that we are not contending as to the 'form' of notice. We protest the total lack of notice in any form."

Then the appellant re-injects the questions of the validity of an extra-territorially served subpoena or notice, and the validity of a subpoena that does not bear a notation of the statutory authority under which issued, and finally argues that he had refused to obey so many subpoenas that he did not know which were involved in these two cases. (RB. 49.)

We will not recur to the argument upon the alleged lack of notice on account of it being extra-territorially served, or to the validity of the subpoenas on account of having no reference to the statutory authority under which issued.

In Case No. 200, the order to show cause served upon the appellant personally and also published, advised him that a "petition" had been "filed" by "special counsel for the United States of America," pursuant to which the court was therein ordering the appellant to appear before it on a specified day at a specified time to show cause why he should not be adjudged guilty of contempt and be punished accordingly, and went on to direct further procedure "in accordance with the provisions of Section 6, c. 762 of the Act approved July 3, 1926, 44 Stat. 835." (R. 200, pp. 11-12.)

In case No. 201, the alias order to show cause, which was personally served upon the appellant and also published, advised him that "upon motion of the United States of America" the appellant is ordered to appear on

a certain day at a certain time and show cause, if any he has, why he should not be adjudged guilty of contempt in failing to appear as a witness in the Sinclair-Fall case, "the circumstances of which are very fully set out in said motion of plaintiff filed herein," and directed further procedure, which, without expressly referring to the Walsh Act, so closely follows the form of the order in Case No. 200, that the appellant could not help but know that the order was under that Act. (R. 201, pp. 11-12.)

In 49 *Corpus Juris*, p. 652 in Section 922, it is said:

> "With some qualifications the general rule is that only when required by statute is service of copies of the pleadings on the other party or on co-plaintiffs or co-defendants necessary, although such service where unnecessary is proper and within the privilege of a party to make."

Thus, in both cases, the appellant was advised that a written petition or motion had been "filed." If he were in any doubt as to what had given rise to the charges against him in each case, such filed papers, if examined by him, would dispel all doubt. (R. 200, pp. 4-11; R. 201, pp. 5-9.)

In 49 *Corpus Juris*, p. 651 in Section 919, it is said:

> "*While all the parties to an action are bound to take notice of pleadings properly filed* within the time required by law, unless actual notice is required by statute or rule of court, yet where a party against whom judgment has been entered obtains leave of court to file a pleading affecting other parties, the parties so affected should be notified of the filing of such pleading, * * *."

We submit that the orders to show cause gave the appellant notice of all elements of the offense charged as fully as an ordinary summons in an action at law. If the orders to show cause in the cases at bar are compared with the summons sustained in *Eddy v. Lafayette*, 163 U. S.

456, 457, 464, 465 (1896), we believe the information contained in said orders to show cause is even more complete than the information contained in the summons sustained in said case. (Cf. *Ammons v. Brunswick etc. Co.*, 141 F. 570 (8 C. C. A. 1905); *Gulf etc. Ry. Co. v. James*, 48 F. 148 (1891); *Freeman v. Paul*, 105 Ind. 451, 5 N. E. 754 (1886); *Hill v. Morgan*, 9 Idaho 718, 76 Pac. 323 (1904); *Flanery v. Kusha*, 143 Minn. 308; 173 N. W. 652 (1919).)

The immemorial forms of bench warrant and of capias are no more definite than were the orders to show cause in the cases at bar. The practice is that after the arrest, the prisoner or his attorney must inquire for the indictment. The only exceptions are by virtue of the statute which requires a copy of the indictment to be served on the accused three days in advance of trial for treason and, two days in advance of trial for other capital offenses. (U. S. C. A., tit. 18, Sec. 562; R. S. Sec. 1033; 1 Stat. 118.) Neither the Walsh Act nor any other statute, nor any constitutional provision required that the petition containing the details be served upon the appellant.

If, after an examination of the indictment, the accused is still uncertain as to the charge, he may satisfy himself through an application for a bill of particulars.

In addition to the cases previously cited herein, we will at this time refer to only one more:

Bowles v. United States, 50 F. 2nd 848 (4th C. C. A., 1931):

Bowles was adjudged in contempt of court for appearing as an attorney in good standing at the bar of the District of Columbia, whereas he had been disbarred there. He was accorded a hearing by the district judge, but offered no testimony to explain his conduct. He had asked for a bill of particulars and for a jury trial, which the Court declined to order. It is said in the opinion, page 852:

"As to the bill of particulars, the granting of this was a matter resting in the sound discretion of the trial court; and there is nothing to show that the discretion was abused. On the contrary, it is difficult to see how the charges could have been made more specific. Respondent was apprised of the date, time, place, and nature of the acts complained of; *and it is inconceivable that, with all that had taken place in the case, he was not fully advised of all of the circumstances of the charge against him.*"

Counsel for the appellant do not deny receipt, as a matter of courtesy from the solicitors for the government, of copies of the petition and of other papers filed in these cases leading up to and subsequent to the orders to show cause. Since no provision of law requires the service of such papers personally upon the accused, he has, through his counsel, received all necessary actual notice. In addition to the cases previously cited to the effect that no fixed form of complaint is necessary in contempt cases, we will here only refer to *Gompers, In re:* 40 App. D. C. 293, 326, 327, 328 (1913) and *Hunter v. United States,* 48 App. D. C. 19, 23-26 (1918).

Counsel for the appellant received copies of all pleadings. The appellant, through their agency, received such notice as a matter of law, unless the counsel of record are not in fact attorneys for the appellant,—a conclusion which we do not even intimate, and which would be contrary to the submission of the appellant in each case of his affidavit of citizenship. The appellant could not have caused his attorneys to appear specially for him to file all the various motions and pleas denying in detail the allegations of the petitions for the orders to show cause, without necessarily knowing the charges he was denying. The appellant could not present the testimony of his counsel in mitigation, unless he knew what offense he was attempting to mitigate. We do not contend that such submission of evidence as to

the merits of the case, waived the objections and exceptions of the appellant to the jurisdiction of the court, raised in his points "A" and "B." And hence we do not dispute the applicability of the decision of this Court in *Baldwin v. Iowa State Traveling Men's Association*, 283 U. S. 522 (1931, preliminary print). But we do not understand that case to hold that a defendant can present testimony on the merits of the case against him and at the same time claim that he had no actual notice (questions of jurisdiction, and form and place of service not being involved in this point) of the charges and no opportunity to present defenses and explanations.

So, when the appellant says—

"We protest the total lack of notice in any form"

the appellant can only mean to again raise legal questions which have already been discussed.

XIII. THERE WAS NO ABANDONMENT OF THE LEVY AND SEIZURE IN CASE NO. 200 BY THE LEVY AND SEIZURE IN CASE NO. 201. (ANSWERING APPELLANT'S POINT H-d.)

The appellant argues, (B. 44-45; RB. 50-51) that since the marshal levied upon and seized the same bonds in case No. 201 of which he had custody in case No. 200, that thereby the government abandoned the seizure in case No. 200.

The abandonment of a levy is a matter of intention. *Stillman v. Hamer*, 70 Kans. 469, 78 Pac. 836 (1904); *Gordon v. Jenney*, 16 Mass. 465 (1820). Among the innumerable cases holding that property *in custodia legis* may be attached, we will only cite one: *Halpin v. Hall*, 42 Wis. 176 (1877).

In some jurisdictions when an *alias* or *pluries* writ of attachment is issued in the same proceeding as the original

writ of attachment, a presumption of law is raised of intention to abandon the original levy. The authorities cited by the appellant, (B. 45) relate to such jurisdictions and to such procedure. In other jurisdictions, the subsequent levies are mere evidence of the necessary intent to abandon. (*Freeman on Executions*, p. 1524.)

The procedure in the cases at bar was entirely different, and, as the court below said, (R. 200, p. 103):

> "* * * Here, there were two different seizures in two different cases upon two different causes of action. The two different levies in these cases are not inconsistent with an intent on the part of the government to maintain each."

Furthermore, even if the appellant were correct, which he is not, the discharge of the attachment in case No. 200 would not invalidate the proceedings and judgment because the appellant was personally served with the order to show cause. The court thereby acquired personal jurisdiction of the appellant and it is not necessary to rely upon the *quasi in rem* procedure.

XIV. THAT APPELLANT WAS NOT CALLED UNTIL APRIL 9, 1928, DID NOT EXONERATE HIM IN CASE NO. 201. (ANSWERING APPELLANT'S POINT H-e.)

Case No. 201 involves the subpoena to appear on April 2, 1928 "and not to depart the court without leave of the Court or district attorney." (R. 201, p. 8.) It is alleged in the petition for the order to show cause in case No. 201, that at the time the subpoena involved in that case was issued, the re-trial of the Sinclair-Fall case was set for April 2, 1928, and

> "7. That the trial of said case was continued by the court to Monday, April 9, 1928." (R. 201, p. 7.)

These allegations are admitted in pleas of the appellant. (R. 201, p. 26.) But the appellant goes on to allege in his pleas and to argue in his briefs, (B. 45-46; RB. 51-52) that he received no notice of the continuance of the trial; that there were no proceedings in the case on April 2, 1928; that he could not have testified on said date, and that he was not called as a witness on said date. (R. 201, p. 26.)

Appellant does not allege that he appeared at court on April 2, 1928, and admits that he was called after the trial commenced on April 9, 1928, and did not respond. (R. 201, pp. 26, 27.)

The evidence is uncontradicted that after the Sinclair-Fall case was set for re-trial on April 2, 1928, the government made a motion on March 22, 1928, for a severance and that the defendants in that case objected that they would need time, if the motion were granted, to take the deposition of Mr. Fall. Accordingly, the court granted the motion and extended the time for the commencement of the trial to April 4, 1928 to accommodate the defendants. Later an exigency arose which necessitated postponement to April 9.

The appellant seeks a strict construction of the Walsh Act as not authorizing a subpoena including the term "not to depart the court without leave of the court or district attorney" and as permitting only a subpoena for a particular day and time. (B. 46.) We suppose that the appellant contends that if he were not called at 10:00 o'clock, sharp, Eastern Standard Time, on April 2, 1928, that he should be freed. We assume that appellant would argue that if the trial had commenced on April 2, 1928, and that day had been taken up with the impaneling of the jury, and the succeeding day with the opening statements of counsel and several succeeding days with the introduction of evi-

dence necessary to make the testimony of the appellant competent, that he would have been under no obligation to respond when finally called as a witness. There surely is no such intention apparent in the Walsh Act. The Act does not require counsel for the government or the court to foresee the exact day that the witness will be called, or to name any particular number of days upon which he shall appear. The Act contemplates the ordinary form of subpoena and the ordinary duties of a witness under such a subpoena.

Section 877 of the Revised Statutes (U. S. C. A., Title 28, Section 655) provides:

> "Witnesses who are required to attend any term of a district court on the part of the United States shall be subpoenaed to attend to testify generally on their behalf and not to depart the court without leave thereof, or of the district attorney."

There is nothing in the Act of July 3, 1926, inconsistent with the applicability of that statute. It is too well known to require the citation of authority that acts of unlimited scope, such as R. S. Sec. 877, *supra*, are enforced in every respect not inconsistent with acts of limited applicability, such as the Act of July 3, 1926. The two are construed together and each is given effect except insofar as they are necessarily inconsistent with each other. Thus, it was perfectly proper for the subpoena served on the appellant to provide that he should not depart without permission.

The appellant cites no cases in his briefs here, but in the Court of Appeals he cited cases in which the subpoena directed appearance on a legal holiday or a time that was past when the subpoena was served, or in which there was evidence of an intention to abandon the subpoena or in which there was no warning that the witness should not depart until excused. Such cases are upon an entirely dif-

ferent set of facts than those appearing in these cases. The difference in facts plainly discloses the difference in the principles of law applicable.

In the case of *Munroe v. United States*, 216 Fed., 107 (C. C. A. 1st Cir. 1914), cited by the appellant to the Court of Appeals it is important to notice that the witness had responded to the subpoena *duces tecum* by personally appearing and stating that the documents subpoenaed were not within his control. There is nothing to indicate that he would have been justified in refusing to appear personally, merely because the documents requested were not within his power to produce. The appellant in these cases has not undertaken in any way to show that he was physically unable to comply with the subpoena of court.

In *Leber v. United States*, 170 Fed. 881 (C. C. A. 9th Cir. 1909), the original subpoena required the witness to attend at 11 A. M., while the copy left with the witness said to attend at 10 A. M. The witness did not appear at either time because he claimed the subpoena was void. It was, therefore, held that the difference in time was no defense.

The service of the subpoena was notice of the command of the court. The appellant was commanded to be in court on April 2, 1928, and "not depart the court without leave of the court or district attorney." The appellant did not obey the command. And even apart from the warning contained in the command that the appellant should not depart until excused, the law is well settled that a witness is required to attend court from time to time and term to term until the case is tried or until he is properly excused.

Brady v. State, 120 Ga., 181; 47 S. E. 535 (1904);
State v. Fairfax, 107 La., 624; 31 So. 1011 (1902);
Mattocks v. Wheaton, 10 Vt., 493 (1838);
Commonwealth v. Smith, 4 Pa. Co. Ct. Rep. 321 (1887).

We also cite 40 *Cyc.* pages 2177-8 and page 2189, paragraph iv.

XV. CONCLUSION.

In the reply brief of the appellant, page 5, it is said that the bar and the public have not clamored for the right to reach into foreign countries for witnesses during the approximately one hundred and forty years of our Republic. The statement was undoubtedly made without knowledge of the history given in 43 Harvard Law Review 121 at pages 122-125, Notes 3-14, of the effort to secure the testimony of witnesses who have gone abroad. But even if there had been no such widespread demand for a way of compelling the testimony of our citizens who have gone abroad the courts would not concern themselves in determining the constitutionality of an Act of Congress with the motives of the Congress or the propriety, justness, wisdom or public policy involved in the legislation. Every possible presumption in favor of the constitutionality of the legislation as embodying the will of the people will be indulged and the act sustained unless plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution. If fairly possible the legislation will be construed so as to avoid not only the conclusion that it is unconstitutional but also grave doubts on that score.

The United States owes a duty of protection to its citizens and its citizens owe a duty of allegiance to their country no matter in what part of the world they may be. The Constitution empowers the Congress to pass legislation making such privileges and such duties effective. Among its powers in that connection is a power to recall a citizen of the United States and to delegate the recall, for purposes appropriate to the judicial functions, to the courts.

International law recognizes the right of an independent and equal nation to recall its citizens and the order,

command or notice of the recall is recognized as being inoffensive to the foreign sovereignty where the citizen may be and it is recognized as not being in violation of any right of asylum of the citizen. The manner of conveying the order, command or notice of recall provided in the Walsh Act involves no breach of the peace or reflection upon the independence, equality, integrity or dignity of the foreign countries and is a method to which nations have tacitly consented as recognized in international law.

By virtue of the Walsh Act, properly extended to affect citizens of the United States beyond its territorial limits, and by virtue of the duty of allegiance of the appellant, his inherent consent to be bound by such laws, the issuance of the subpoenas for him involved in the cases at bar created a valid obligation upon his part to return and give testimony. He received such notice of the command that it is not contrary to natural justice or due process to hold him responsible for his default.

Even if the service of a subpoena and an order to show cause upon a citizen of the United States in France were contrary to international law, which it is not, or were contrary to the laws of France, which the appellant has not made to appear, the Act of Congress would nevertheless prevail and not be unconstitutional. Unless contrary to some prohibition of the Constitution the Acts of Congress are the supreme laws of the land and supersede international law. Since Congress has the extra territorial jurisdiction to provide for the recall of citizens and since, as a matter of fact, the means adopted for the recall correspond with natural justice and due process and violate no other right of the appellant guaranteed by the Constitution, neither international law nor the laws of France can render such legislation invalid or unconstitutional.

The Walsh Act provides for enforcement either pursuant to personal service upon the defaulting witnesses abroad or at home or through *quasi in rem* procedure. The purely *in personam* method of acquiring jurisdiction to proceed is constitutional for the reason aforesaid. The *quasi in rem* procedure is constitutional for the reason that the enforcement of any judgment will not exceed execution upon property of the witness previously seized. The quality of the notice accorded in following the *quasi in rem* procedure of the Walsh Act satisfies due process. Modifying the *sui generis* nature and procedure ordinarily surrounding "criminal contempt" proceedings as in the Walsh Act is declaratory and regulatory. It leaves the offense penal and does not make it a crime. It leaves the forms and methods to be followed *sui generis* in so far as not modified.

The Walsh Act provides for all notice of the offense and opportunity to be heard in defense necessary to satisfy due process. The order to show cause will identify the court, place, and time for the hearing and the nature of the charge. If anything more were necessary it is implied that the order will contain such additional information. It was unnecessary for Congress to go into greater detail as to the contents of the order to show cause.

In authorizing the seizure of property the Congress cannot be charged with contemplating an unreasonable search and seizure. It is implied in the Walsh Act that the procedure to be followed in making the seizure shall not violate the Fourth Amendment.

The offense of "criminal contempt" not being a crime "within the Sixth Amendment or common understanding" and the defaulting witness being given an opportunity to be present at the hearing and when judgment is pronounced it is unnecessary to enforce his actual physical presence.

The Sixth Amendment does not guarantee *equal* process to one on trial for a crime with the process available to the government. The Walsh Act accords the accused substantially equal process. Appellant and other witnesses who may be subpoenaed under the Act are not affected by the feature of the Act relative to the rights to subpoena witnesses from abroad that are vested in the government or by the absence of such rights in the accused, if they were absent, and therefore cannot question the constitutionality of the Walsh Act upon the ground of alleged denial of equal process to those accused of crime.

The poor as well as the rich, the non-property owner as well as the property owner may be punished under the Walsh Act, but if that were not true the classification of property owners as against non-property owners would be within the discretion of the Congress. Attachment of property prior to proof of guilt for contempt is not unreasonable. The Act is not arbitrary or capricious and the judgment of the Congress in that respect should prevail.

The procedure which was followed in the cases at bar substantially, if not literally, complied with all the express and implied requirements of the Walsh Act.

The showing upon which the subpoenas were issued was sufficient to justify the discretion of the court, which is not reviewable, even if the appellant were in a position to challenge the sufficiency of the showing, which he is not.

There was no need for the Walsh Act to require any special form of subpoena or that the ordinary form bear a notation of the statute authorizing service abroad. As a matter of fact the appellant knew under what statute he had been subpoenaed.

The orders to show cause which were personally served upon the appellant, and also published, gave him all the

notice necessary to due process. There was no need for the written petition and motion leading up to the orders to show cause and containing the details to be served with the order to show cause. Such pleadings having been filed, the appellant was charged with knowledge of their contents. His counsel had actual knowledge of their contents. If the orders to show cause had been defective in substance it was the appellant's privilege to apply for a bill of particulars.

> "* * * it is inconceivable that, with all that had taken place in the case, he was not fully advised of all the circumstances of the charge against him." (*supra*, page 163.)

There having been two different causes of action, the fact that in the second cause the same bonds were seized as had been seized in the first case raises no presumption of an intention of the government to abandon the seizure in the first case under the circumstances of the prosecution of both cases.

The fact that the appellant was not called until April 9, 1928, in case No. 201, although subpoenaed to appear on April 2, 1928, and although there were no proceedings on April 2, 1928, the case having been continued by order of the court to April 9, 1928, did not excuse the appellant, for he was commanded "not to depart the court without leave of the court or district attorney." Such form of subpoena, complying with R. S. Section 877 (U. S. C. A. Title 28, Sec. 655), is not inconsistent with the Walsh Act. The appellant did not appear on April 2, 1928 and cannot excuse himself upon the ground that there were no proceedings on that date for he was given no leave, either by the court or the district attorney, to depart or excusing him from appearing on the date to which the trial was continued.

It is respectfully submitted that the judgments in both cases should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

Nos. 200 and 201.—October Term, 1931.

200	Harry M. Blackmer, Petitioner, *vs.* The United States of America.	On Writs of Certiorari to the Court of Appeals of the District of Columbia.
201	Harry M. Blackmer, Petitioner, *vs.* The United States of America.	

[February 15, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The petitioner, Harry M. Blackmer, a citizen of the United States resident in Paris, France, was adjudged guilty of contempt of the Supreme Court of the District of Columbia for failure to respond to subpoenas served upon him in France and requiring him to appear as a witness on behalf of the United States at a criminal trial in that court. Two subpoenas were issued, for appearances at different times, and there was a separate proceeding with respect to each. The two cases were heard together, and a fine of $30,000 with costs was imposed in each case, to be satisfied out of the property of the petitioner which had been seized by order of the court. The decrees were affirmed by the Court of Appeals of the District (49 F. (2d) 523) and this Court granted writs of certiorari.

The subpoenas were issued and served, and the proceedings to punish for contempt were taken, under the provisions of the Act of July 3, 1926, c. 762, 44 Stat. 835, U. S. C., Tit. 28, secs. 711-718.[1]

[1]The Act is as follows: "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whenever letters rogatory shall issue out of any court of the United States, either with or without interrogatories addressed to any court of any foreign country, to take the testimony of any witness, being a citizen of the United States or domiciled therein, and such witness, having been personally notified by it according to the practice of such court, to appear and testify pursuant to such letters rogatory and such witness shall neglect to appear, or having

The statute provides that whenever the attendance at the trial of a criminal action of a witness abroad, who is "a citizen of the United States or domiciled therein," is desired by the Attorney General, or any assistant or district attorney acting under him, the judge of the court in which the action is pending may order a subpoena to issue, to be addressed to a consul of the United States and to be served by him personally upon the witness with a tender of travelling expenses. Secs. 2, 3. Upon proof of such service and of the failure of the witness to appear, the court may make an order requiring the witness to show cause why he should not be punished for contempt, and upon the issue of such an order the court may direct that property belonging to the witness and

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appeared shall decline, refuse, or neglect to answer to any question which may be propounded to him by or under the authority of such court, to which he would be required to make answer were he being examined before the court issuing such letters, the court out of which said letters issued may upon proper showing order that a subpoena issue addressed to any consul of the Untied States within any country in which such witness may be, commanding such witness to appear before the said court at a time and place therein designated.

"Sec. 2. Whenever the attendance at the trial of any criminal action of a witness, being a citizen of the United States or domiciled therein, who is beyond the jurisdiction of the United States, is desired by the Attorney General or any assistant or district attorney acting under him, the judge of the court before which such action is pending, or who is to sit in the trial of the same, may, upon proper showing, order that a subpoena issue, addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the said court at a time and place therein designated.

"Sec. 3. It shall be the duty of any consul of the United States within any country in which such witness may be at the request of the clerk of the court issuing any subpoena under this Act or at the request of the officer causing such subpoena to be issued, to serve the same personally upon such witness and also to serve any orders to show cause, rules, judgments, or decrees when requested by the court or United States marshal, and to make a return thereof to the court out of which the same issued, first tendering to the witness the amount of his necessary expenses in traveling to and from the place at which the court sits and his attendance thereon, which amount shall be determined by the judge on issuing the order for the subpoena and supplied to the consul making the service.

"Sec. 4. If the witness so served shall neglect or refuse to appear as in such subpoena directed, the court out of which it was issued shall, upon proof being made of the service and default, issue an order directing the witness to appear before the court at a time in such order designated to

within the United States may be seized and held to satisfy any judgment which may be rendered against him in the proceeding. Secs. 4, 5. Provision is made for personal service of the order upon the witness and also for its publication in a newspaper of general circulation in the district where the court is sitting. Sec. 6. If, upon the hearing, the charge is sustained, the court may adjudge the witness guilty of contempt and impose upon him a fine not exceeding $100,000, to be satisfied by a sale of the property seized. Sec. 7. This statute and the proceedings against the petitioner are assailed as being repugnant to the Constitution of the United States.

First. The principal objections to the statute are that it violates the due process clause of the Fifth Amendment. These con-

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show cause why he should not be adjudged guilty of contempt and be punished accordingly.

"Sec. 5. Upon issuing such order the court may, upon the giving of security for any damages which the recusing witness may have suffered, should the charge be dismissed (except that no security shall be required of the United States), direct as a part of such order that the property of the recusing witness, at any place within the United States, or so much thereof in value as the court may direct shall be levied upon and seized by the marshal of said court in the manner provided by law or the rule of the court for a levy or seizure under execution, to be held to satisfy any judgment that may be rendered against such witness in the proceeding so instituted.

"Sec. 6. The marshal, having made such levy, shall thereupon forward to the consul of any country where the recusing witness may be a copy of the order to show cause why such witness should not be adjudged guilty of contempt with the request that said consul make service of the same personally upon the recusing witness, and shall cause to be published such order to show cause and for the sequestration of the property of such witness, in some newspaper of general circulation in the district within which the court issuing such order sits, once each week for six consecutive weeks.

"Sec. 7. On the return day of such order or any later day to which the hearing may by the court be continued, proof shall be taken; and if the charge of recusancy against the witness shall be sustained, the court shall adjudge him guilty of contempt and, notwithstanding any limitation upon the power of the court generally to punish for contempt, impose upon him a fine not exceeding $100,000 and direct that the amount thereof, with the costs of the proceeding, be satisfied, unless paid, by a sale of the property of the witness so seized or levied upon, such sale to be conducted upon the notice required and in the manner provided for sales upon execution.

"Sec. 8. Any judgment rendered pursuant to this Act upon service by publication only may be opened for answer within the time and in the manner provided in section 57 of the Judicial Code."

tentions are (1) that the "Congress has no power to authorize United States consuls to serve process except as permitted by treaty"; (2) that the Act does not provide "a valid method of acquiring judicial jurisdiction to render personal judgment against defendant and judgment against his property"; (3) that the Act "does not require actual or any other notice to defendant of the offense or of the Government's claim against his property"; (4) that the provisions "for hearing and judgment in the entire absence of the accused and without his consent" are invalid; and (5) that the Act is "arbitrary, capricious and unreasonable."

While it appears that the petitioner removed his residence to France in the year 1924, it is undisputed that he was, and continued to be, a citizen of the United States. He continued to owe allegiance to the United States. By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country. Thus, although resident abroad, the petitioner remained subject to the taxing power of the United States. *Cook* v. *Tait*, 265 U. S. 47, 54, 56. For disobedience to its laws through conduct abroad he was subject to punishment in the courts of the United States. *United States* v. *Bowman*, 260 U. S. 94, 102. With respect to such an exercise of authority, there is no question of international law,[2] but solely of the purport of the municipal law which establishes the duties of the citizen in relation to his own government.[3] While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application,

[2] "The law of Nations does not prevent a State from exercising jurisdiction over its subjects travelling or residing abroad, since they remain under its personal supremacy." Oppenheim, International Law, 4th ed., vol. I, sec. 145, p. 281; Story, Conflict of Laws, 8th ed., sec. 540, p. 755; Moore's International Law Digest, vol. II, pp. 255, 256; Hyde, International Law, vol. I, sec. 240, p. 424; Borchard, Diplomatic Protection of Citizens Abroad, sec. 13, pp. 21, 22.

[3] Compare The Nereide, 9 Cranch. 388, 422, 423; Rose v. Himely, 4 Cranch. 241, 279; The Apollon, 9 Wheat. 362, 370; Schibsby v. Westenholz, L. R. 6 Q. B. 155, 161. Illustrations of acts of the Congress applicable to citizens abroad are the provisions found in the chapter of the Criminal Code relating to "Offenses against Operations of Government" (U. S. C., Tit. 18, chap. 4; United States v. Bowman, 260 U. S. 94, 98-102) and the provisions relating to criminal correspondence with foreign governments, Act of January 30, 1799, 1 Stat. 613, U. S. C., Tit. 18, sec. 5.

so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power. *American Banana Company* v. *United Fruit Company,* 213 U. S. 347, 357; *United States* v. *Bowman, supra*; *Robertson* v. *Labor Board,* 268 U. S. 619, 622. Nor can it be doubted that the United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal. Compare *Bartue and the Duchess of Suffolk's Case,* 2 Dyer's Rep. 176b, 73 Eng. Rep. 388; *Knowles* v. *Luce,* Moore 109, 72 Eng. Rep. 473.[4] What in England was the prerogative of the sovereign in this respect pertains under our constitutional system to the national authority which may be exercised by the Congress by virtue of the legislative power to prescribe the duties of the citizens of the United States. It is also beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned. *United States* v. *Blair,* 250 U. S. 269, 281. And the Congress may provide for the performance of this duty and prescribe penalties for disobedience.

In the present instance, the question concerns only the method of enforcing the obligation.[5] The jurisdiction of the United States over its absent citizen, so far as the binding effect of its legislation is concerned, is a jurisdiction *in personam,* as he is personally bound to take notice of the laws that are applicable to him and to obey them. *United States* v. *Bowman, supra.* But for the exercise of judicial jurisdiction *in personam,* there must be due process, which requires appropriate notice of the judicial action and an opportunity to be heard. For this notice and opportunity the statute provides. The authority to require the absent citizen to return and testify necessarily implies the authority to give him notice of the requirement. As his attendance is needed in court, it is appropriate that the Congress should authorize the court to direct the notice to be given and that it should

[4]See, also, Hyde, *op. cit.*, vol. 1; sec. 381, pp. 668 669.

[5]The instant case does not present the questions which arise in cases where obligations inherent in allegiance are not involved. See Pennoyer *v.* Neff, 95 U. S. 714; Galpin *v.* Page, 18 Wall. 350, 369; Harkness *v.* Hyde, 98 U. S. 476, 478; Riverside & Dan River Cotton Mills *v.* Menefee, 237 U. S. 189, 193; McDonald *v.* Mabee, 243 U. S. 90, 92; Wuchter *v.* Pizzutti, 276 U. S. 13.

be in the customary form of a subpoena. Obviously, the requirement would be nugatory, if provision could not be made for its communication to the witness in the foreign country. The efficacy of an attempt to provide constructive service in this country would rest upon the presumption that the notice would be given in a manner calculated to reach the witness abroad. *McDonald* v. *Mabee,* 243 U. S. 90, 92. The question of the validity of the provision for actual service of the subpoena in a foreign country is one that arises solely between the Government of the United States and the citizen. The mere giving of such a notice to the citizen in the foreign country of the requirement of his government that he shall return is in no sense an invasion of any right of the foreign government and the citizen has no standing to invoke any such supposed right. While consular privileges in foreign countries are the appropriate subjects of treaties,[6] it does not follow that every act of a consul, as, *e. g.*, in communicating with citizens of his own country, must be predicated upon a specific provision of a treaty. The intercourse of friendly nations, permitting travel and residence of the citizens of each in the territory of the other, presupposes and facilitates such communications. In selecting the consul for the service of the subpoena, the Congress merely prescribed a method deemed to assure the desired result but in no sense essential. The consul was not directed to perform any function involving consular privileges or depending upon any treaty relating to them, but simply to act as any designated person might act for the Government in conveying to the citizen the actual notice of the requirement of his attendance. The point raised by the petitioner with respect to the provision for the service of the subpoena abroad is without merit.

As the Congress could define the obligation, it could prescribe a penalty to enforce it. And as the default lay in disobedience to an authorized direction of the court, it constituted a contempt of court and the Congress could provide for procedure appropriate in contempt cases. The provision of the statute for punishment for contempt is applicable only "upon proof being made of the service and default." Sec. 4. That proof affords a proper basis for the proceeding, and provision is made for personal service

[6]Cf. Dainese *v.* Hale, 91 U. S. 13, 15, 16; In re Ross, 140 U. S. 453, 462 463. See, also, U. S. C., Tit. 22, secs. 71 *et seq.;* Hyde, *op. cit.*, sec. 488, pp. 828-832.

upon the witness of the order to show cause why he should not be adjudged guilty. For the same reasons as those which sustain the service of the subpoena abroad, it was competent to provide for the service of the order in like manner. It is only after a hearing pursuant to the order to show cause, and upon proof sustaining the charge, that the court can impose the penalty. The petitioner urges that the statute does not require notice of the offense, but the order to show cause is to be issued after the witness has failed to obey the subpoena demanding his attendance and the order is to be made by the court before which he was required to appear. This is sufficient to apprise the witness of the nature of the proceeding and, he has full opportunity to be heard. The further contention is made that, as the offense is a criminal one, it is a violation of due process to hold the hearing, and to proceed to judgment, in the absence of the defendant. The argument misconstrues the nature of the proceeding. "While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offenses have been regarded as *sui generis* and not 'criminal prosecutions' within the Sixth Amendment or common understanding." *Myers* v. *United States,* 264 U. S. 95, 104, 105. See, also, *Bessette* v. *Conkey,* 194 U. S. 324, 336, 337; *Michaelson* v. *United States,* 266 U. S. 42, 65, 66; *Ex parte Grossman,* 267 U. S. 87, 117, 118. The requirement of due process in such a case is satisfied by suitable notice and adequate opportunity to appear and to be heard. Cf. *Cooke* v. *United States,* 267 U. S. 517, 537.

The authorization of the seizure of the property belonging to the defaulting witness and within the United States, upon the issue of the order to show cause why he should not be punished for contempt (Sec. 5), affords a provisional remedy, the propriety of which rests upon the validity of the contempt proceeding. As the witness is liable to punishment by fine if, upon the hearing, he is found guilty of contempt, no reason appears why his property may not be seized to provide security for the payment of the penalty. The proceeding conforms to familiar practice where absence or other circumstance makes a provisional remedy appropriate. See *Cooper* v. *Reynolds,* 10 Wall. 308, 318. The order that is to be served upon the witness contains the direction for the seizure. The property is to be held pending the hearing and

is to be applied to the satisfaction of the fine if imposed and unless it is paid. Given the obligation of the witness to respond to the subpoena, the showing of his default after service, and the validity of the provision for a fine in case default is not excused, there is no basis for objection to the seizure upon constitutional grounds. The argument that the statute creates an unreasonable classification is untenable. The disobedience of the defaulting witness to a lawful requirement of the court, and not the fact that he owns property, is the ground of his liability. He is not the subject of unconstitutional discrimination simply because he has property which may be appropriated to the satisfaction of a lawful claim.

Second. What has already been said also disposes of the contention that the statute provides for an unreasonable search and seizure in violation of the Fourth Amendment. It authorizes a levy upon property of the witness at any place within the United States in the manner provided by law or rule of court for levy or seizure under execution. A levy in such a manner, either provisionally or finally, to satisfy the liability of the owner is not within the constitutional prohibition.

The petitioner raises the further and distinct point that the statute limits the availability of the subpoena to the Government and that 'by excluding defendants in criminal prosecutions' from the right to such a subpoena violates the provision of the Sixth Amendment that the accused shall have 'compulsory process for obtaining witnesses in his favor.' We need not consider whether the statute requires the construction for which the petitioner contends, as in any event the petitioner, a recalcitrant witness, is not entitled to raise the question. *Nelson* v. *United States,* 201 U. S. 92, 115; *Southern Railway Company* v. *King,* 217 U. S. 524, 534; *Jeffrey Manufacturing Company* v. *Blagg,* 235 U. S. 571, 576; *Blair* v. *United States, supra,* at p. 282.

Third. The statute being valid, the question remains as to the procedure in its application against the petitioner. He insists that the showing for the issue of the subpoenas requiring him to attend was inadequate. But the 'proper showing' required was for the purpose of satisfying the court that the subpoenas should issue. The petitions, in the instant cases, were presented to the judge of the court by the official representatives of the Government and their statement as to the materiality and importance of the testimony expected from the witness was unquestionably sufficient to

give the court jurisdiction to issue the subpoenas, and, unless they were vacated upon proper application, the petitioner was bound to obey. Nor was it necessary that the subpoenas should 'identify' themselves with the statute under which they were issued. The petitioner as a citizen of the United States was chargeable with knowledge of the law under which his attendance as a witness could be required. It was sufficient that the subpoenas required his attendance to testify on behalf of the United States at the time and place stated. Equally unavailing is the objection that after the petitioner had refused to appear in response to the subpoenas, the orders to show cause why he should not be punished for contempt did not specify the offense. As the statute prescribed, he had been served with the subpoenas and had defaulted, and he had also been served with the order which directed him to show cause why he should not be adjudged guilty of contempt and provided for the seizure of his property to be held to satisfy any judgment that might be rendered against him in the proceeding. The notice which he thus received was sufficient to inform him of the character of the charge against him and of the hearing at which he would have opportunity to present his defense. The petitioner also insists that the seizure which was made in case No. 200 was abandoned by virtue of the seizure of the same property under the order issued in No. 201. But the second levy was not antagonistic to the first. The proceedings were consistent.

In No. 201, the contention is made that the petitioner was subpoenaed to attend on April 2, 1928, and that the case in which his testimony was desired was not tried until April 9, 1928. There is no suggestion that the petitioner appeared on April 2, 1928, in compliance with the subpoena, and the record shows that the case in which he was subpoenaed was continued by the court until the later date. The subpoena contained the usual provision that the witness was "not to depart the court without leave of the court or district attorney." Cf. Rev Stat., sec. 877; U. S. C., Tit. 28, sec. 655. It was the duty of the petitioner to respond to the subpoena and to remain in attendance until excused by the court or by the Government's representatives.

Decrees affirmed.

Mr. Justice ROBERTS took no part in the consideration and decision of this case.